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# IN THE UNITED STATES
# CIRCUIT COURT OF APPEALS
## FOR THE NINTH CIRCUIT

CHARLES H. BAKER, ALGERNON S. NORTON and SEATTLE WATER FRONT REALTY COMPANY, a corporation,

*Appellants,*

*vs.*

JOHN W. SCHOFIELD, as Receiver of the Merchants' National Bank of Seattle,

*Appellee.*

## BRIEF OF APPELLANTS

**Upon Appeal from the United States District Court for the Western District of Washington Northern Division.**

B. S. GROSSCUP,
W. C. MORROW,
Bank of California Building,
Tacoma, Washington.

CORWIN S. SHANK,
HORATIO C. BELT,
Alaska Building,
Seattle, Washington.

*Solicitors for Appellants.*

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## INTRODUCTION.

This is an action brought by the receiver of a national bank to declare a trust arising out of a transaction, now claimed by the receiver to have been fraudulent, and occurring more than sixteen years ago. There were six principal witnesses to the trans-

action—being the appellant Charles H. Baker, Receiver, now living; Sol G. Simpson, purchaser, dead; A. H. Anderson, agent, dead; Wm. L. Seeley, special examiner for the Comptroller of the Currency, dead; Columbus T. Tyler, bookkeeper, who made out the report of the receiver reporting to the Comptroller the sale to Simpson, dead; W. D. Hofius, purchaser of all the tide lands of the receivership other than block 430, dead.

## STATEMENT OF ISSUES FRAMED BY PLEADINGS.

The second amended bill of complaint in this action contains the most general allegations and are in substance as follows:

That in June, 1895, the appellant Baker was appointed receiver of the Merchants' National Bank of Seattle, continuing as such receiver until April, 1899, when he resigned, and A. W. Frater, of Seattle, was appointed receiver and so continued until February, 1913, when the present receiver, John W. Schofield, a national bank examiner, was appointed.

That among the assets that came into the hands of receiver Baker were certain preference rights to purchase certain tide lands in King County, Washington, which preference rights arose from the fact

that the insolvent bank owned certain uplands, and giving the receiver this right by reason of such upland ownership. That among these preference rights was the right to purchase block 430, which it is alleged is now worth $300,000.

The bill further alleges that the comptroller of the currency authorized the purchase of the tidelands, and that the appellant Baker, as receiver, thereafter entered into a contract with the State of Washington for the purchase of the same, and made several installment payments thereon. That proper officials of the state issued a contract to receiver Baker, and the said contract provided "upon payment in full of the consideration named in said contract, the State of Washington would issue to the Merchants' National Bank of Seattle, or its assignee, its deed in fee simple to said tidelands."

The bill further alleges that on November 26, 1897, Baker, while acting as receiver, purported to convey and assign this contract, without actual consideration, to one Sol G. Simpson.

It is further alleged that, in order to conceal the assignment of the contract and to disguise its general nature, the appellant Baker, as receiver, on October 6, 1897, petitioned the United States Court in "vague and general terms" for leave to sell cer-

tain assets of the trust, and that an order was made purporting to authorize the receiver to sell the assets at private sale, or otherwise. The bill further alleges that this assignment was made by receiver Baker to Sol G. Simpson "for Baker's own use, without the knowledge or consent of the Comptroller, and for the purpose of secretly defrauding said insolvent bank, its creditors and stockholders, and said Simpson, during all the time that he held, or purported to hold, title to said property, held the same in trust for said Baker," (Tr. p. 7). That this sale to Simpson embraced blocks 429 and 430—the same having been made to Simpson as a part of one and the same transaction. It is not claimed, however, by the bill, or during the course of the evidence, that the fraudulent features of the transaction attached to any other than block 430. The bill further alleges that Baker from time to time advanced to and reimbursed Simpson such sums as were required to pay the balance of the purchase price remaining due the State.

The bill further alleges that, as a part of this fraudulent scheme, appellant Baker secretly and for the purpose of defrauding the bank, caused the State of Washington to issue to Simpson harbor area lease No. 181, being for the harbor area lying in

front of and adjacent to block 430, and that Simpson never did have any interest in this lease, but held the same at all times thereafter, and until 1905, in trust for Baker, and subject to his control. (Tr. pp. 7, 8.)

The bill further alleges that in 1905, Baker caused Simpson to convey to Algernon S. Norton, Baker's legal advisor in the State of New York, the contract of purchase, and that thereafter in 1907, Baker caused to be incorporated the appellant Seattle Water Front Realty Company, and had Norton and wife convey the said land to the said Realty Company.

The said bill, as a justification for the sixteen years' delay in bringing this action, makes the following allegation:

"The facts herein alleged were wholly unknown to any of the creditors and stockholders of said bank, and to plaintiff and the Comptroller of the Currency until the year 1913, and were, until that time, concealed from them by the defendants, as above set forth, and were first discovered by the Comptroller of the Currency on or about the 1st day of February, 1913," (Tr. p. 12).

The bill then prays that the appellants be decreed to hold said property in trust for the receiver, and in the prayer the receiver offers to pay to the

appellants the amount that was paid to the State of Washington to perfect their title, and the taxes for the sixteen years thereon, and for general relief. (Tr. pp. 2-15.)

Separate answers were made by the three appellants, and, briefly, they admit the allegations of the bill with reference to the time each of the three parties acted as receiver. They admit the sale to Sol G. Simpson on November 26, 1897, and admit that the same was made after an order of the United States Court had been obtained therefor, but allege that the sale was made with the full knowledge and consent of the Comptroller and his examiners, and that after the sale to Simpson, which was made at a profit to the receivership estate, report thereof was made to the Comptroller of the Currency, and the money remitted therefor.

The answers further allege that in March, 1899, the appellant Baker repurchased from Simpson one of the two blocks that had been sold to Simpson by paying him therefor the amount that had been expended thereon, together with interest and costs.

The answers further allege that the receiver did not have the right as a matter of law to purchase the tide land contracts from the State, for the reason

that the same was not within the contemplation of the statute.

The answers also further allege that the appellee has been guilty of laches. That he cannot do equity. That the appellants have paid the taxes upon the property for more than seven successive years before the commencement of this action, and deny that the appellee is the owner of the land or has any interest therein, and also deny all the allegations of the bill with reference to fraud or of secret dealing. (Tr. pp. 21, 32, 52.)

After the trial the lower court entered its decree adjudging that the sale to Simpson of block 430 through an assignment of the tide land contract was fraudulent, and was made for the use and benefit of the appellant Baker. That in the repurchase which Baker made from Simpson, whether the same was oral or in writing, the same were fraudulent and void. That the conveyances by the State of Washington to appellant Norton, and from Norton to the Seattle Water Front Realty Company, were likewise void as against the said appellee. Also that the harbor area lease No. 181 was likewise an asset of the receivership, and the officers and agents of the Seattle Water Front Realty Company are directed to execute a deed to the receiver covering block 430

and the harbor area lease No. 181. The decree further directs that:

"Neither the defendant Seattle Water Front Realty Company nor defendants Baker and Norton shall be required to make, execute or deliver any of the aforesaid instruments until there shall have elapsed thirty days after the time in which appeal can be taken by defendant Seattle Water Front Realty Company, nor, in the event of appeal being taken by defendant Seattle Water Front Realty Company, until thirty days shall have elapsed after such appeal, if any, shall have been finally determined adversely to it and if, no appeal being taken by defendant Seattle Water Front Realty Company, or such appeal being adversely determined to it, the defendant Seattle Water Front Realty Company shall make such deposit of instruments as aforesaid, then within sixty days from such delivery of conveyances to the clerk of this Court, the complainant shall pay or cause to be paid into this Court for the defendant Realty Company, the sum of $10,977.13, to-wit, $8,130.19 principal and $2,846.94 interest, said principal being all the sums by the defendants expended in taxes upon the aforesaid Block 430 and Harbor Lease 181 and in payments directly or indirectly made to the State of Washington under the contract for Block 430 aforesaid and upon said lease, and should complainant fail so to do, he shall lose the benefits of this decree. The defendant company may immediately withdraw the aforesaid sum without further order of the Court." (Tr. pp. 81, 82.)

It is from this decree that this appeal is taken.

## ASSIGNMENTS OF ERROR.

### I.

Because the appellee has no right or authority under the laws of the United States to maintain the action set forth in his second amended bill of complaint on which said cause was tried.

### II.

Because the appellee has no authority and has at no time had any authority from the officers of the Government of the United States having jurisdiction of receiverships of national banks, to comply with the conditions of the decree which was rendered, or of any decree which under the issues might have been rendered, in that said officers had not prior to the commencement of said suit, nor have they since the commencement of said suit, authorized the payment to appellants or either of them, of the money adjudged to be due under the findings of the Court and the money to which said appellants would be entitled under any decree which might or could have been rendered.

### III.

Because there is not and has not been for more than ten years last past available to the trust which

the receiver represents in this action any funds with which to do equity to the appellants and each of them.

IV.

Because the District Court erred in finding and adjudging that the appellant Baker had no authority to sell Tide Land Contract No. 728 covering the purchase from the State of Washington of Tide Land Block 430 to Sol G. Simpson.

V.

Because the District Court erred in finding and adjudging that the appellant Baker, while acting as receiver of the Merchants' National Bank, did not make a *bona fide* sale of Tide Land Contract No. 728 covering Tide Land Block 430 to Sol G. Simpson, and in finding that the said Baker at the time of making said sale reserved to himself, for his own benefit and use, the said contract and an interest therein.

VI.

Because the District Court erred in finding and adjudging that the appellant Baker did not acquire an assignment of said Tide Land Contract No. 728 covering Tide Land Block 430 from Sol G. Simpson

in good faith and in the usual course of business, and in finding that a trust attached in favor of the Merchants' National Bank, its stockholders and creditors, to the title acquired by the said Baker from the said Simpson.

VII.

Because the District Court erred in finding and adjudging that the title acquired by the appellant Baker from the State of Washington to the said Tide Land Block 430 was in trust for the use and benefit of the insolvent Merchants' National Bank, its creditors and stockholders, and in holding that the title acquired by the appellant Water Front Realty Company was and is subject to said trust.

VIII.

Because the District Court erred in finding and adjudging that the appellee's action was not, prior to its commencement, barred by lapse of time and laches.

IX.

Because the District Court erred in finding and adjudging that appellee's action was not, prior to its commencement, barred by the statute of limitations of the State of Washington.

X.

Because the District Court erred in including in the decree the harbor area lease adjacent to and in front of said Tide Land Block 430 purchased by Sol G. Simpson from the State of Washington after the appellant Baker had ceased to be receiver.

XI.

Because the District Court erred in ordering the appellant Seattle Water Front Realty Company to hold said harbor area lease for the use and benefit of the appellee and to convey legal title to the appellee.

XII.

Because the District Court erred in finding that the said harbor area lease was at any time a part of the trust of the Merchants' National Bank.

XIII.

Because the District Court erred in finding and adjudging that the stock of the appellant A. S. Norton in the appellant Seattle Water Front Realty Company, which was issued to said Norton in consideration of an undivided 3% interest, purchased by said Norton from said Baker prior to the conveyance to said appellant Seattle Water Front

Realty Company, was not a *bona fide* purchase by said Norton, and the Court erred in holding that said 3% interest was subject to said trust of the Merchants' National Bank and its receiver.

XIV.

Because the District Court erred in finding and adjudging that the interest in the appellant Seattle Water Front Realty Company owned by A. S. Norton in the form of stock purchased by him after the formation of said company, and the interest in said company owned by the Union Savings Bank & Trust Company of Seattle in the form of stock assigned to said company, is subject to the trust decreed by the Court in favor of the appellee.

XV.

Because the District Court erred on the trial in admitting, over the objections of the appellants, that portion of the testimony of the witness Francis Rotch wherein it appears that the said Rotch, in answer to a question to state a conversation with Sol G. Simpson in 1900, testified:

"Mr. Simpson was turning a great many things over to me and of course I opened a great deal of his mail, unless it was marked Personal, and I came across a notice from the Land Commissioner saying

that there was a payment due and interest due on Block 430 and so I went to Mr. Simpson and asked him whether I should pay it or not * * *. That was in the year 1900—the end of 1900. I have refreshed my memory about that. He said, 'Yes.' He said 'Pay that.' He says, 'That belongs to Charlie Baker,' and then I said, 'Shall I pay it?' and he says, 'Yes, pay it.' And then I paid it and made the entry of it in my books and charged Mr. Baker with that payment, but that was all the conversation we had at that time as I remember it." (Tr. p. 89.)

And after a further question, as follows:

"It came up again about two years later—I think 1902; I am not quite certain about that, and Mr. Simpson was hard up in those times. He had a good deal of property but did not have much money and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said: 'Now, can't we get rid of this Block 430?' I thought maybe at that time probably he got it from Baker or something of the kind. He said, 'No, Mr. Baker put that in my hands and I have to hold it in trust for him right along.' He said, 'We cannot dispose of that.' " (Tr. p. 90.)

And further, in answer to a question by appellee's counsel:

"Q. Just the same, he told you in substance that he was carrying that property for Charlie Baker, or words to that effect?

"A. Yes, sir.

"Q. And that he never had any interest in it?

"A. Yes." (Tr. p. 90.)

To all of which testimony, and the questions eliciting the same, objection was made at the time on the ground that the evidence was hearsay, immaterial and irrelevant.

XVI.

Because the District Court erred in admitting on the trial the evidence of the witness Lester Turner over the objection of the appellants, that in 1898 or 1899 he, the witness, had a conversation with Sol G. Simpson as follows:

"The conversation came up in this way: I was talking to Mr. Simpson in regard to tide land holdings that the bank held. It owned quite a large amount of tide lands and he was director of the bank, and I talked to him about the plans of the bank and in that connection I asked him about his own holdings down there. I knew that he held some tide lands. And he told me that a portion of those lands belonged to Charlie Baker—that he was carrying the title for him to accommodate him."

And also the following in response to a question as to a later conversation:

"I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way incidentally to the properties and I asked him how he came to hold the title to that property that belonged to Baker. 'Well,' he said, 'Baker did not want it known that he had taken the property while he was

receiver of the bank and it might not bear investigation,' and he was carrying it for that reason." (Tr. p. 91.)

Which testimony was objected to by appellants' counsel as hearsay, immaterial and irrelevant.

XVII.

Because the District Court erred in rendering a decree in favor of the appellee, which decree is contrary to the testimony and against the law because the equity of the case entitled the appellants to a decree of dismissal.

## STATEMENT OF FACTS AS DISCLOSED BY THE EVIDENCE.

The appellant Charles H. Baker became a resident of the State of Washington in 1887, immediately following his graduation from Cornell University. For six years after he arrived in Seattle he practiced the profession of civil engineer, and during that time became connected with the building of an electric light and power station for the Rainier Power & Railway Company. (Tr. p. 254.) That owing to the panic of 1893 he became financially embarrassed, and sought the postmastership of Seattle, receiving the endorsement of many prominent people. Failing in the application for postmaster, he received in

June, 1895, the appointment as receiver of the Merchants' National Bank. (Tr. p. 256.) This position he held until April, 1899, when he resigned and A. W. Frater was appointed in his stead. (Tr. p. 167.) Judge Frater wound up the affairs of the trust, making a final report and distributing all the assets of the trust, and the same was closed by July, 1901. (Tr. p. 168.) He did not resign, nor was anything done in the receivership until February, 1913, when he received word from the Comptroller of the Currency asking him to resign, and thereupon the present appellee, John W. Schofield, a national bank examiner and connected with the office of the Comptroller of the Currency, was appointed receiver. (Tr. p. 189.) At the time appellant Baker was appointed receiver, he employed as his attorneys the firm of Stratton, Lewis & Gilman, which firm continued to act as attorneys for receiver Frater to the close of the receivership. Baker also employed as bookkeeper Harry Meserve, who continued in that position until March or April, 1897, and was then succeeded by Joseph B. Hill who acted as bookkeeper for Baker until he went out of office in April, 1899. (Tr. p. 216.)

In February, 1897, Baker wrote to the Comptroller of the Currency setting forth that by virtue

of the bank being the owner of certain upland property bordering upon Seattle harbor it was entitled thereby to a prior right of purchase from the State of certain contiguous tide lands; setting forth that the law gave the right to contract for such purchase in ten annual payments, and that the contracts were assignable; stating also that in his judgment this right to purchase was a valuable asset of the trust, and directed the Comptroller to ratify his having taken up these contracts with the State, and stating the appraised value of the various pieces of property therein set forth. It should be here remarked that the bank had filed these applications for the preference right to purchase prior to the appointment of the receiver, but the applications had not yet been allowed. The Acting Comptroller replied to this letter approving the securing of these contracts, and stating "inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time, should such a course seem advisable." (Tr. p. 99.)

The receiver made the first payment January 12, 1897, when Harry Meserve was bookkeeper. On contract No. 727, being block 429, he paid $66.40; on contract No. 728, being block 430, he paid $148.80. The next payment was made March

1, 1897. The reason for this payment being made so close to the first was because the law provided that payments should be made on March 1st. This second payment on each of these contracts was for the same principal amount. On contract No. 727 covering block 429, he paid $4.78 interest, and on contract No. 728 covering block 430, he paid $10.42. These were all the payments the receiver ever made upon these contracts. (Tr. p. 115.)

These disbursements were entered in the ledger, and the amount of money which was paid out was entered as "Additional Assets Good." (Tr. pp. 192, 193.) The contract which was issued to the receiver provided for the payment of one-tenth of the appraised valuation of block 430 (which was $1,488.) on the 1st day of March of each year, together with the interest upon the remaining portion of the principal for the next ten succeeding years. (Tr. pp. 104-108.) This contract was—

"Subject, however, to any lien or liens that may arise or be created in consequence of or pursuant to the provisions of an act of the Legislature of the State of Washington entitled 'An act prescribing the ways in which waterways for the uses of navigation may be excavated by private contract, providing for liens upon tide and shore lands belonging to the state, granting rights of way across lands belonging to the state,' approved March 9, 1893." (Tr. p. 105.)

Under this law these tide lands were filled—this work of filling having been completed in the summer of 1913—and the filling charges against block 430 aggregate $79,352.76 (Tr. p. 211), for which certificates have already been issued, all of which remain unpaid.

In the early part of 1897, after receiver Baker had sold off all the assets that could be turned, he issued under the direction of the Comptroller of the Currency a circular, scheduling therein all the remaining assets of the trust, and the same was printed in pamphlet form, addressed to the creditors, and upon the outer sheet thereof was the following:

"To the Creditors of the Merchants' National Bank:

In view of the great difficulty and necessary sacrifice in converting to cash the real estate and other assets of this trust, I have been authorized by the Comptroller to effect exchanges of such assets for outstanding Receiver's certificates with such holders as may be desirous of doing so upon a satisfactory basis.

Chas. H. Baker,
Receiver, Seattle, Wash." (Tr. p. 217.)

The schedule of real estate and other assets included all the tide land contracts that were held by the bank, among which were tide land contract No. 727 on block 429 and tide land contract No. 728 on block 430. (Tr. pp. 218-227.) Joseph B. Hill,

the bookkeeper, says that this circular was sent out to all the creditors of the bank. (Tr. p. 228.) Mr. Baker says that these circulars were mailed to the stockholders, creditors and principal real estate men around Seattle, and other people who were in the habit of making investments. (Tr. p. 258.) Mr. Hill says there were no customers for these, nor were there any inquiries made excepting the application of A. H. Anderson and W. D. Hofius & Company, and that these two applications were the only ones they ever had to buy any tide lands whatsoever. (Tr. p. 236.) Mr. Baker says that prior to November, 1897, he does not recall an application in response to this circular, or otherwise, from any creditor of the bank to exchange his claim against the bank for any of these listed Seattle tide lands, and there were no applications to purchase any of these tide lands, and in fact he says there was no application to purchase any of the other assets of the estate. That the real estate market was absolutely dead; in fact there was no market, and that this condition continued up to the time when he turned over the receivership to his successor. (Tr. p. 259.)

After having made these strenuous efforts to dispose of these "chips and whetstones" remaining

in the receivership, a special examiner appeared upon the scene—which was the custom about every six months. This examiner, Wm. L. Seeley, came to Seattle in the fall of 1897, after a six months unsuccessful campaign had been made by means of this circular with all the creditors, stockholders and other parties that might be interested to exchange these remaining assets for outstanding receiver's certificates. It should be borne in mind that these receiver's certificates were simply the evidence of claims that had been presented against the receiver and properly allowed—all in accordance with the custom of the Comptroller of the Currency. Under date of October 9, 1897, Examiner Seeley made a report to the Comptroller of the Currency, writing a letter inclosing therein his report, and also certified copies of a petition and order authorizing the compromise and private sale of the assets of the trust, all of which were by the examiner considered bad and doubtful. (Plaintiffs' Ex. 8; Tr. pp. 120, 121.) The analysis of this report of the examiner is of controlling importance. It will be remembered that he had come here for the purpose of looking into the affairs of the bank, and after examining the same gives his views of the method by which this estate must be wound up. After reciting that

there does not appear to be any material change in the affairs of the trust, the examiner goes on to report as follows:

"The receiver is proceeding under the authority given him by you to exchange real estate holdings of the trust for receiver's certificates. The disposition of the real estate in this manner is to the interest of the creditors of the trust. * * * While it is true that there is a material improvement in Seattle, and inside business and dwelling property has appreciated, the effect has not been felt in outside additions, and it is not probable that the holdings of the trust will appreciate to any considerable extent during the life of the receivership. In any event the valuation placed upon the real estate by the receiver in making the exchange for receiver's certificates at their face is sufficient to meet any natural advance and make the exchange favorable and to the interests of all concerned.

"I do not find any material appreciation of the assets or change in conditions which justifies reporting thereon in detail, these matters being heretofore fully reported by me. *The remaining assets are practically bad and doubtful,* from which in my judgment more can be obtained by compromise and private sale than through an attempt to enforce collection, or their disposal at public auction. It is the judgment of the receiver and his attorneys, and it appears to be to the interest of the creditors of the trust, that the receiver have full power and authority to so compromise and sell privately *the remaining assets, and I have, in connection with the attorneys of the receiver petitioned the United States Circuit Court,* and obtained an order thereof, authorizing him as such receiver to compromise and sell privately *the bad and doubtful assets remaining in his hands, for cash."* (Tr. pp. 122, 123.)

This petition and order secured by Examiner Seeley "in connection with the attorneys for the receiver" is the petition and order which it is alleged in the bill were couched in vague and uncertain terms with the purpose on the part of the receiver to aid him in carrying out his conspiracy to defraud the estate.

Some question has been raised throughout the trial that, inasmuch as the technical listing of these tide land contracts, to the extent to which cash had been invested therein, was under the heading of "Additional assets good," Examiner Seeley did not intend to include these among his general statements in his report "the remaining assets are practically bad and doubtful". A letter from the Comptroller of the Currency, Charles G. Dawes, under date of April 7, 1898, addressed to Mr. Baker, referring to the report of Examiner Seeley, recites that Seeley "states that it is the judgment of the Receiver and his attorneys, *that you as Receiver have full power and authority to compromise and sell the remaining assets of your trust, then remaining in your hands*". (Tr. p. 129.) We cite this interpretation which the Comptroller himself places upon Examiner Seeley's report after it had been on file in the Comptroller's office for some six months.

We now arrive at that point in the statement of these facts where receiver Baker acted with reference to the authority given him by the order of the court that was secured upon the petition of Examiner Seeley in connection with the attorneys for the receiver. It will be borne in mind that even up to this time none of the creditors holding receiver's certificates considered these tide land contracts, with 90% of the appraised valuation yet to be paid and drawing 6% interest, and subject to the filling lien which might be imposed upon them at any time, of sufficient value to exchange their evidences of indebtedness against a defunct bank for this tangible property.

This block was then located out in deep water, about one-half a mile off the shore at West Seattle, and about a mile down the bay from its head. (Tr. p. 117.) The only direct evidence that we have upon the sale of these blocks to Sol G. Simpson is that of appellant Baker himself. Mr. Simpson's voice was silenced by death about eight years ago. A. H. Anderson, who had a direct connection with this transaction and through whom the sale was made, was still alive at the time of the trial of this case, but, owing to his then suffering from an incurable disease from which he died a few days after the

trial, was unable to give testimony in the case, as was shown by the testimony of his attending physician. (Tr. p. 243.)

It will be remembered that Examiner Seeley was in Seattle in the early part of October, 1897. The petition for the sale of the remaining assets of the trust was presented, and an order secured on October 9th. All of the liquid assets had been disposed of. There was no real estate market; everything was absolutely dead. The circular sent to all the stockholders, creditors and real estate men of Seattle, some seven or eight months previously, had produced no result. Baker gives very graphically the situation.

"When the examiner was here he said that the practice of the Department, when the assets got slow and stagnant, was to close them up as expeditiously as they could by private sale, and to that end they authorized the receivers, under a blanket order, to make the best sales and disposition that they could. Mr. Seeley was the examiner here at that time and he, therefore, had a petition prepared to the Court to authorize such a general order, and a general order from the Comptroller was obtained.

MR. BAUSMAN: A general order what?

A. (Continuing.) From the comptroller. Then in the latter part of November, 1897, I took these contracts to Mr. Simpson and Mr. Anderson and tried to get them to buy them. I wanted them to buy all the bank's holdings, and Mr. Anderson was not

interested and did not see anything in them. Mr. Simpson did not, but he asked me to make a price on them, and the price I made was the cost of it plus fifty dollars on each contract, and Mr. Simpson said he would take two of them. So that disposed of the first two of the bank's holdings in tide lands, and that was the first offer, with the exception of a dollar apiece that had been obtained, since we had them.

Q. You say you had had an offer of a dollar apiece, when was that offer made?

A. Well, that was made about the middle of 1897, I should say.

Q. Was that offer of a dollar apiece for the assignment of the contract as it then stood, or a dollar apiece profit to the trust?

A. A dollar apiece for the contract as it stood.

Q. You had made at that time payments to the State?

A. Yes.

Q. And Mr. Simpson was to pay you, in addition to what you had paid to the State, fifty dollars for each contract, was that correct?

A. Yes.

Q. That was your arrangement with him?

A. Yes.

Q. Did Mr. Simpson give you any money or other equivalent of money with which to consummate this transaction?

A. I think he gave his check for it.

Q. In determining how much you had in these contracts, from whom did you get the information,

that is how much the trust had in them, from whom did you get the information?

A. From Mr. Hill, who was the clerk.

Q. He was your clerk and bookkeeper, wasn't he?

A. Yes.

Q. And to the result given you by Mr. Hill, then you added fifty dollars, is that what I understood you to say was done?

A. Added fifty dollars to the figures given me by Mr. Hill.

Q. If there was an error in that computation, it resulted in that way, did it?

A. Yes.

Q. At that time, Mr. Baker, and for a considerable time after that did you have any reserve interest, in expectancy or actual, present or in expectancy, in those two contracts?

A. I did not.

Q. Did you at that time have any expectation of ever acquiring any interest in those two contracts?

A. I did not." (Tr. pp. 260, 261, 262.)

Mr. Baker says that Mr. Anderson and Mr. Simpson were business associates. (Tr. p. 263.) That Mr. Simpson, who was regarded as a very wealthy lumberman, did a great deal of speculating, and "he was always taking flyers." (Tr. p. 262.) Mr. Baker says he secured the amount that had been expended upon these two blocks from Mr. Hill, his

bookkeeper, and then added fifty dollars to each one of the contracts, and this was the sum at which he assigned these contracts to Simpson. There appears, however, to have been an error in this. Instead of but one payment having been made on these contracts, there had been two—one of them having been made in January, 1897, while Harry Meserve was bookkeeper for the receiver, and the other in March of the same year after J. B. Hill became bookkeeper. (Tr. pp. 114, 115.) When Hill gave Mr. Baker the amount that was due, he overlooked the payment that had been made to the State when Meserve was bookkeeper, so that Baker added the $50.00 to the one payment that had been made on each of the contracts plus the interest, and this is the sum which formed the basis of the sale to Simpson. This sale was made on November 26, 1897, and the sale was reported to the Comptroller of the Currency in the next quarterly report in the usual and ordinary way, and upon the form sent out by the Comptroller. (Tr. p. 263; Defts. Ex. E. Tr. p. 200.) It will be observed that the report to the Comptroller shows the following—that the receiver "Sold to S. G. Simpson Tide Land Contracts # 727 & 728..... 315.20." (Tr. p. 200.) This was the report that was made to the Comptroller of the Currency. In

addition to the report made to the Comptroller of the Currency there was entered upon the journal and in the ledger of the receiver the following:

"Additional Assets (good)—
Tide land Contracts # 727, 116.40 # 728, 198.80
sold to S. G. Simpson.....315.20." (Tr. p. 194.)

In each of these items it will be observed that there is $50.00 additional to the one annual installment paid the State. Mr. Baker says that the examiner knew all about this sale. (Tr. p. 265.) That the contracts No. 727 and No. 728 were listed among the assets of the receivership, and that when the sale was made to Simpson these contracts were delivered to Simpson and the money entered in their stead. (Tr. pp. 264, 265.) Mr. Baker also stated that it would be impossible to misplace or lose these contracts, so that the examiner each time would be thoroughly cognizant of the fact that these contracts were no longer among the assets of the receivership, and that certain moneys had been substituted therefor. (Tr. p. 275.)

In the early part of 1898, during the time that Mr. Baker was still receiver and shortly after this sale to Simpson, Mr. Baker took over what is known as the Snoqualmie Falls Power Company. The trustees of this company, among others, were himself,

Mr. Simpson and Mr. Anderson. The development of this electric enterprise brought the severest opposition from the General Electric Company, a competitive company, which resulted in their stirring up all the trouble they could for Mr. Baker in his receivership, (Tr. p. 266) and, as a result, charges were made against his administration of the trust. (Tr. p. 267.)

"Q. Do you know whether or not charges were made against your administration of this trust, along about the year 1898, and from then on?

A. Yes, there were a good many charges—there were several charges.

Q. Do you know whether a special examiner came here to investigate those matters?

A. Mr. Wing was a special examiner and he came for that purpose.

Q. At the instance of whom, as you were informed?

A. The comptroller.

Q. Now, you may state to the Court what examination Mr. Wing made of the affairs of your trust.

A. He made the usual examination that every examiner makes as to the condition of the assets, of the assets which had been liquidated and so forth, and then he stated that he had been charged to investigate a number of complaints that had been filed, and particularly complaints with reference to Anderson and Simpson. Just what the complaints

were he did not disclose except that they were complaints.

Q. Did he examine your books in that connection?

A. He did, yes.

Q. Did he make an unusually close examination of the properties that were remaining?

A. He did.

Q. Now, do you know whether or not he was informed at that time of the sale of those two blocks No. 429 and 430 to Sol G. Simpson?

A. Yes, he was informed.

Q. And he was informed of the price at which you had sold them?

A. He was.

Q. Was that a part of the investigation which he was making?

A. That was a part of the investigation.

Q. Mr. Hill testified here yesterday that he accompanied Mr. Wing over to West Seattle to see the tide lands; do you know whether he examined the balance of those tide lands in connection with the matter?

A. He went for that purpose and I suppose he did.

Q. In other words, that was the purpose you know that he went for?

A. Yes.

Q. Did you discuss with Mr. Wing the value of those tide lands at that time, and the market conditions surrounding them?

A. I did." (Tr. pp. 267-268.)

Mr. Hill, the bookkeeper, refers likewise to Mr. Wing, the examiner sent here, and says that he was here two or three days, and that in connection with Mr. Wing's examination of the assets of the receivership he showed him these tide land properties in West Seattle. (Tr. p. 230.) While Mr. Wing was in Seattle he interviewed Mr. Simpson and Mr. Anderson, and a great many other people around town, including those who had made complaints; also bankers and business men generally. (Tr. p. 269.)

At this juncture in the statement of these facts, we pause to make two comments:

First. That from the time Mr. Wing made this personal investigation as to the value of these tide land properties, and this transaction with Mr. Simpson, until this suit was brought, not one criticism was ever raised against Mr. Baker for this transaction.

Second. Mr. Wing, a special examiner of the Comptroller of the Currency, at the time of the trial ought to have been accounted for in some way, or produced at the trial as one who would be able to speak definitely upon this matter, and if not then the report he made to the Comptroller of the Currency should have been produced.

The efforts of the appellants to take the deposition of the appellee and the Acting Comptroller of the Currency at the time the suit was brought, in order to inquire into some of the records and proceedings of the Comptroller's office, and get the letters and reports bearing upon this matter, was promptly met with urgent objections by counsel for the appellee, and the Court denied the appellants this right. (Tr. p. 73.)

The sale to Simpson of these two contracts was on November 26, 1897. The investigation by Special Examiner Wing was in the spring of 1898. No further offer was made for the remaining West Seattle tidelands, until March, 1899. It appears from a letter written by receiver Baker to Comptroller Dawes, dated March 27, 1899, that he had sold, subject to the approval of the Comptroller, lots in block 431 for $1,000. Mr. Baker remarked in this letter—"This is therefore an additional asset and when your Mr. Wing was here no value was set upon it." (Tr. p. 201.) This is further evidence that Mr. Wing went through and valued all of these tide lands. That these transactions took place in March, 1899, there can be no doubt from all the record. (Tr. pp. 201, 270.) It was in March, 1899, that Baker received an offer from Anderson for the

remaining West Seattle tide lands. (Tr. p. 269.) While Anderson was negotiating for these West Seattle tide lands, Mr. Baker had a conference with Mr. Simpson, (Tr. p. 270) and at which time Mr. Simpson said he was thinking of selling the two contracts he had purchased from Baker about a year and a half previously. (Tr. p. 271.) Anderson's negotiations with Baker were for all the remaining five tide land contracts that the bank held, and it appears that he figured also on buying these two contracts from Simpson. (Tr. p. 271.) It was at this time that Baker asked Simpson if he would not sell him one of the contracts for what he had in it, and this Simpson agreed to do. (Tr. p. 271.) The other contract on block No. 429, was sold by Simpson to Anderson, and turned over by Anderson to W. D. Hofius & Company, the same party who purchased through Anderson the remaining West Seattle tide land contracts held by the receiver. Baker says with reference to this transaction with Simpson:

"Well, I told him I would like to have him carry the title for me. I gave him a note for his advances and interest and I asked him to carry the title of it until I would get rid of my judgments. I was consolidating the street railways in Seattle and promoting this power company deal and had a

large expectancy through the success of those projects, and he agreed to do it. That was the arrangement." (Tr. p. 271.)

At this time Simpson was a trustee of the power company, was interested with Baker, and his prospective interests in the company were promising. (Tr. p. 272.) It will be kept in mind that Baker was heavily encumbered with judgments that were standing against him, and which were not liquidated until 1905, and, as Baker testified, it was for this reason that he wanted Simpson to keep the title in his name until these judgments were cleared up. (Tr. p. 271.)

The sale of the remaining five tide land contracts were made to Anderson for $2,000 cash. (Tr. p. 203.) This was entered upon the journal and ledger of the receiver in due and orderly course. (Tr. p. 196.) It appears from the evidence in this case that Anderson, who bought the rights of the receiver in block 431 for $1,000, sold this to W. D. Hofius & Company for $1,750, and the five remaining blocks of tide lands, the contracts on which he bought from the receiver, for $2,000, and the contract on block No. 429 that he bought from Simpson, he sold to W. D. Hofius & Company for $5,000. The receiver reported this sale to the Comptroller

of the Currency in his quarterly report as usual. (Defts. Ex. I; Tr. pp. 207, 208.) Baker never knew what profit, if any, Anderson made until about a year ago when Baker was in Seattle, (Tr. p. 322) and did not know when he was a witness upon the stand in this case that Anderson had procured block 429 from Simpson and included this in his sale to W. D. Hofius & Company for $5,000. (Tr. p. 322.)

Mr. Baker says that he was actively engaged in the power business in the spring of 1899, when he resigned from the receivership, down to the time when his father died, which was October 6, 1903. (Tr. p. 276.) That in the spring of 1904, he was expecting a partial distribution from his father's estate, and it was then that he took up with Mr. Simpson the matter of transferring the legal title to him. (Tr. pp. 276, 277.) At this time Mr. Baker cleaned up the various judgments that had been recovered against him. He says that Mr. Mark E. Reed substantially stated all the facts with reference to the matter of his taking over this title, (Tr. p. 277) and we therefore turn to Mr. Reed's testimony, who was a witness for the plaintiff, to ascertain these facts, which bind the appellee and which the appellants accept.

Mr. Reed was a son-in-law of Mr. Simpson; he is native born of the State of Washington, a logger by business, and a member of the Capitol Commission of the State. His first business connection with this Baker matter was in the early part of 1904. (Tr. p. 146.) It was about this time that Sol G. Simpson turned over to Mr. Reed, his son-in-law, the business management of his properties, and Mr. Reed upon taking charge of these properties found that Mr. Simpson had listed block 430 among his assets. (Tr. p. 155.) In discussing property matters, Mr. Simpson told him that block 430 belonged to Charles Baker. (Tr. p. 155.) In May, 1904, while Mr. Baker was in California, he called on Mr. Simpson, who was there for his health, and discussed with him this property matter. Upon being referred to Mr. Reed, communication was then had with Mr. Reed by letter reading as follows:

"May 9th, '04.

Mr. Mark Reed,

Seattle.

Dear Sir:

I had a talk with Mr. Simpson in S. F. about the tide land which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first 2 or 3 payments I

made myself. Mr. Simpson's books, however, will show the status of the account. There is one more payment due next March to complete the contract with the state. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same to Chicago, and I will send you from there a form of assignment to execute, together with note for the account, due 1 year after date, which plan Mr. S. consented to and will doubtless advise you to that effect.

I may be away several months and I may have occasion to use the item, or dispose of it, and so I think it had better be put in the shape indicated.

My address will be as below.

Yours very truly,

CHAS. H. BAKER,

Auditorium Annex, Chicago.

I believe there is an item to my credit also of a certain sum for right-of-way across the tract sold to the N. P." (Tr. p. 147-8.)

The first two or three payments made by Mr. Baker and referred to in this letter, were the payments made by Baker to Simpson when he purchased the property from Simpson in March, 1899. These are referred to by Mr. Baker. (Tr. pp. 282, 283.)

Mr. Baker wrote another letter to Mr. Reed in November, 1904 (Tr. p. 148), and again in January,

1905. (Tr. p. 150). Mr. Reed then secured from the Commissioner of Public Lands, at Olympia, the balance due on contract No. 728. This was furnished by the Commissioner of Public Lands and formed the basis of the settlement between Mr. Baker and Mr. Reed. (Tr. p. 151.) The amount remaining due the state on this contract was $1,077.28. (Tr. p. 152.) When the settlement was made Mr. Baker gave Mr. Reed two checks—one for $1,077.28, and the other for $2,000. The check for the amount due the state was taken by Mr. Reed and indorsed over to E. W. Ross, Land Commissioner for the State, and forwarded to the office of the Land Commissioner. The other for $2,000 was retained by Mr. Reed. Mr. Reed stated: "There was a lease of the waterway in front of the lots that Mr. Simpson had acquired in his own name, and I insisted that Mr. Baker should take that lease along with the block and pay for the lease. I remember we had some dealings backwards and forwards in arriving at a settlement as to the price of the lease." (Tr. p. 153.) Mr. Baker then paid Mr. Reed the amount of the advances with interest at 6% per annum, and, in addition thereto, paid the amount that was agreed upon as the purchase price of harbor area lease No. 181. (Tr. p. 154.) Mr. Reed stated that the main point

of their discussion was to arrive at a sum that should constitute the consideration for the transfer of this lease. (Tr. p. 162.)

"Q. The point is that you agreed upon a lump sum for the sale of the harbor area to Baker or his assigns?

A. Yes, sir.

Q. That had nothing to do with any advances Mr. Simpson had made on that account?

A. No, sir.

Q. Your contention now was, Mr. Reed, or rather your idea was that Mr. Simpson owned that harbor area and you wanted to sell it in connection with the transfer of the land?

A. I think so, that was what I told Mr. Baker, that he owned the harbor area and I did not propose to transfer the block back to him unless he took the area because it was no use to us." (Tr. p. 163.)

These sums were then agreed upon and Mr. Reed forwarded to the Commissioner of Public Lands this check accompanied by a letter. (Tr. p. 156.) This check was drawn upon the Washington National Bank of Seattle, where Mr. Baker kept an account. It appears that he had expected certain moneys to be deposited to his credit, but they were not so deposited in time to take care of the check when it was presented for payment in due course.

(Tr. p. 164.) As soon as the check was protested Mr. Reed addressed another letter to the Commissioner of Public Lands referring to the check given by *Mr. Charles H. Baker* to pay for balance due on tide land contract No. 728 for block 430, stating that the check had been protested, and directing the Commissioner of Public Lands to hold all papers in the case until Mr. Reed should take the matter up again with *Mr. Baker,* which he would do at once. (Tr. p. 157.) The correspondence connected with tide land contracts was all kept with the duplicate copies of those contracts on file with the Commissioner of Public Lands. (Tr. p. 254.) The foregoing communications become important as being one of the sources disclosing upon the face of these transactions the direct connection of Mr. Baker with this property as early as 1905, and these facts disclosed by the public records could have been discovered by a mere examination of the files. (Tr. pp. 157, 158.) This check was protested and notice thereof given to Mr. Reed; also Mr. Baker; also the Commissioner of Public Lands; likewise the Capitol National Bank of Olympia; as well also the Washington National Bank of Seattle. (Tr. p. 161.)

During the course of straightening out this title considerable correspondence was had with the

Commissioner of Public Lands by Norwood W. Brockett, Mr. Baker's attorney, on the letterhead of the Seattle-Tacoma Power Company, which designated Thomas B. Hardin as general attorney and Norwood W. Brockett, assistant attorney. (Tr. pp. 247-254.) These letters were all filed with tide land contract No. 728, covering block 430. (Tr. p. 254.) Mr. Hardin and Mr. Brockett had no other legal connection than this power company, which was known as Mr. Baker's company. (Tr. p. 273.) Mr. Hardin had given up his private practice to join Mr. Baker in this enterprise. (Tr. pp. 274-279.) In addition to this correspondence, as early as 1904 Mr. Baker wrote to the Commissioner of Public Lands with reference to the harbor area in front of block 430, and received a reply from the Commissioner stating that the harbor area in front of block 430 was under lease to S. G. Simpson. (Tr. pp. 278, 279.)

It appears that after Mr. Baker had cleared up the judgments that had been recovered against him that no unusual secrecy was maintained with reference to the ownership of this property, considering Mr. Baker's method of handling all his business affairs. As Mr. Norton, his attorney and subsequently the attorney for Receiver Frater, says:

"I might say this: That in all my transactions

with Mr. Baker, in his different matters, water power enterprises and other enterprises, that he seemed to be a rather exceptionally reticent man and I would not know about his business myself until there would be some occasion for me to take a hand in it to do something about it, and then I would find out that for a long time, perhaps, he had had an interest in something or been negotiating with something." (Tr. p. 184.)

In 1906, when the railroad excitement came on, which was the first real impetus that tide land properties had, Mr. Baker received a letter from McGraw & Kittinger asking for a quotation upon this property. (Tr. p. 281.) In 1907, when Mr. Baker got a loan from the National Bank of Suffern, New York, that bank wrote to the Seattle National Bank of Seattle with reference to the value of the stock in the Seattle Water Front Realty Company, which owned block 430. (Tr. pp. 280, 281.) Mr. A. S. Norton, in whose name the title to this property was taken when the purchase was completed from Simpson, had been Mr. Baker's attorney during the receivership; had continued as the attorney for Judge Frater after he became receiver. (Tr. p. 168.) After Examiner Wing's visit none of this was further investigated, notwithstanding the fact that Mr. Baker's enemies circulated vicious reports about him and about this transaction being a questionable one,

and the matter was taken up with Judge Frater's attorneys, Messrs. Preston & Gilman. (Tr. p. 171.) On September 9, 1907, Judge Frater, who was still the receiver of the Merchants' National Bank of Seattle, as presiding Judge of the Superior Court of King County, granted Mr. Baker's wife a divorce, and, as a part of the property settlement in that divorce proceeding, certain of the capital stock of the Seattle Water Front Realty Company was awarded to the wife, and the court found that the settlement appeared to him to be just and equitable. (Tr. p. 212.)

We now turn to the evidence as it relates to the actual value of this property at the time Baker sold it to Simpson on November 26, 1897. C. B. Bussell, who admitted that he was the original tide land boomer of Seattle (Tr. p. 116), "stated that he had no recollection of any sales of tide lands west of the West Waterway in 1897, 1898 or 1899, excepting possibly that he heard of some in 1899, but did not recall a specific instance." (Tr. p. 116.) Yet, notwithstanding this, he states that he regarded the contract on block 430, on which only two payments had been made, as worth in 1897 $5,000. (Tr. p. 115.) Mr. Bussell was then asked "whether he knew of any other sales west of the West Waterway prior to

1905, and he answered that he did not know, but he did hear of some sales west of the West Waterway in the fall of 1905." (Tr. pp. 116, 117.)

A. P. Hill testified that he regarded tide land contract No. 728 on block 430, in 1897, as worth $4,800. On cross-examination he testified that in 1897 there were no tide lands selling in the locality of this property, and that there was very little doing in tide lands until 1905. "That up to 1905 tide land west of the East Waterway, which included the section embracing Harbor Island and all west of it, *was regarded as speculative, and that it was held up to that time purely for speculative purposes.*" (Tr. p. 119.) These are all the witnesses appellee offered upon the value of these tide land contracts in 1897.

On behalf of the appellants Herbert S. Upper was tendered as a witness and testified: "That prior to 1900, * * * he did not know of any tide lands selling west of the West Waterway. That block 430 was way out in the water." (Tr. p. 213.) "The witness further stated that in 1897 block 430 did not have very much value, and, upon being questioned as to what he meant by this, he stated that values in that section had not been established. That there had been very little business or demand. That the same condition prevailed in 1899. That these

conditions changed principally after the railroad excitement in 1905 or 1906." (Tr. pp. 213, 214.)

George F. Dearborn was produced as a witness and stated that he had made a specialty of tide lands. "The witness testified that in 1897, '98 and '99 he did not know of any sales of tide lands west of the West Waterway." (Tr. p. 214.) "That his firm dealt principally in tide lands nearer the city, and that in 1897 and '98 by advertising extensively they were able to get rid of a very little tide-land property. That their property in which they sold these lots was on First Avenue South, in block 329. The witness stated that he did not think there was any market for anything located south of Atlantic Street or west of the East Waterway." (Tr. pp. 214, 215.)

Joseph B. Hill, when asked as to whether these tide lands at this time had any market value, stated "They had not—they were purely speculative." (Tr. p. 237.)

Mr. Baker stated that in 1897 there was no sale for this class of property; that everything was absolutely dead. (Tr. p. 259.)

It is conceded by every one that the activity in the tide land market came with the railroad excitement in 1905 and '06.

The appellee hinges his case largely upon the

testimony of Francis Rotch and Lester Turner. It appears that Rotch has lived in Washington for 26 years, and in Seattle 17 years, having come to Seattle the year prior to the sale of these tide land blocks to Simpson. That he was employed by Mr. Simpson, first, as manager of the shingle department of the Simpson Logging Company, and after that he was Mr. Simpson's private secretary and kept Mr. Simpson's books. (Tr. p. 133.) He says that he received a notice from the Commissioner of Public Lands stating that there was a payment due on block 430, which was the occasion of his having a conversation with Mr. Simpson in reference to it. (Tr. pp. 134, 135.)

"That was in 1900; the end of 1900. I have refreshed my memory about that. He said, 'yes,' he said, 'pay that,' he says, 'but that belongs to Charlie Baker,' and then I said, 'Shall I pay it?' and he said, 'Yes, pay it. And then I paid it and I made the entry of it in my books, and charged Mr. Baker with that payment. And that was all the conversation we had at that time, as I remember it." (Tr. p. 135.)

About two years after, when he had another conversation with Mr. Simpson, he says Mr. Simpson stated to him: "Mr. Baker put that in my hands and I have held it in trust for him right along."

(Tr. p. 136.) Upon cross-examination the following questions were asked and answers given:

"Q. (Mr. Shank). Mr. Rotch, when did these conversations—I mean, when did you recall that you had these conversations?

A. When did I recall them?

Q. Yes.

A. I think when you and Mr. Kelleher asked me about it, I ran back in my memory and they came up, that is all.

Q. I visited you, didn't I, at one time, and I asked whether you recalled anything that was said or done and you stated that you did not have any recollection of it, didn't you, at that time?

A. At that time I probably did, because this is the first that it had been brought to my attention.

Q. And this was about three months ago that I called on you and asked you those questions?

A. Three or four months ago, I could not say when.

Q. Since that time you have recalled it and told Mr. Kelleher of the fact?

A. Yes, Mr. Kelleher asked me about it also." (Tr. pp. 136, 137.)

Mr. Rotch stated that the foregoing was all that was said by Mr. Simpson. (Tr. pp. 137, 138.) Mr. Rotch then stated that Mr. Simpson was a very wealthy man, and one of the largest loggers on the Sound. That he was at all times reckoned as a man

of sterling integrity and honor, and was known for his upright and honorable dealings. (Tr. p. 139.) That he was never at any time associated with or connected in any way, directly or indirectly, with any effort to conceal, defraud or otherwise do harm in a business transaction. That he was a generous man, and with his friends he was most generous, and that with his friends there was practically no limit to his generosity. (Tr. p. 140.)

On redirect examination Mr. Bausman asked Mr. Rotch these leading questions:

"Q. Just the same, he told you, in substance, that he was carrying that property for Charlie Baker, or words to that effect.

A. Yes, sir.

Q. And that he never had any interest in it?

A. Yes.

MR. SHANK. No, he didn't say that.

MR. BAUSMAN. He said so now." (Tr. p. 140.)

It is upon this testimony that the appellee seeks to largely hang his case. On recross-examination the following took place:

"Q. (MR. SHANK) Mr. Rotch, to get at this matter exactly, you mean now to state, as a part of this record, that he told you that he never had any

interest in that property—do you mean to say that Mr. Simpson told you in the conversation in 1902 that he never had any interest in this property?

A. That is what he said.

Q. That he, at that time, did not have any interest, or that he never had?

A. I charged it up to Mr. Baker's account.

Q. Did he tell you that he never had had any interest in the property, or that he didn't have an interest at that time in the property?

A. That I could not say; that was a long time ago, and I could not say.

Q. Well, which way do you want the record to stand?

A. I don't care.

Q. You can't say?

A. No." (Tr. pp. 141, 142.)

Mr. Lester Turner testified that he had lived in Seattle for 25 years. That in 1896, and for several years subsequent thereto, he had been in the banking business; was first cashier, and subsequently president of the First National Bank of Seattle of which Sol G. Simpson was a stockholder and a director. He says it was after the Klondike excitement in 1897 that he had his first conversation with Mr. Simpson about his tide land holdings—he says he thinks in 1898 or 1899. (Tr. p. 144.) It was in one of these conversations that Mr. Simpson told

him "that a portion of those lands belonged to Charlie Baker, that he was carrying the title for him, to accommodate him." (Tr. p. 144.) Within a year or two after in another conversation Mr. Turner states that Mr. Simpson told him "Baker didn't want it known that he had taken the property while he was receiver of the bank, and it might not bear investigation, and he was carrying it for him for that reason." (Tr. p. 145.)

The witness stated on cross-examination that this was all that was ever said about this tide land transaction. That Mr. Simpson was a man who stood high in the community. That his honor and integrity were unimpeachable, and he was always recognized as a dependable and upright citizen. (Tr, p. 146.)

## ARGUMENT.

We have made a statement of the facts as they are disclosed by the record with little or no comment thereon, believing that the sequence of events and the circumstances surrounding each transaction bear such convincing proof of themselves as to require little or no supplementing. We have cited the record to bear out the statement of each fact, so that the court has in the foregoing statement the material facts in the case in the order of their occurrence and the testi-

mony bearing thereon. Every material fact accords with Mr. Baker's fair, honest and convincing dealing with his trust. The appellee, to succeed in this case upon the facts, must interpret all these acts and doings of the receiver, thus in accord with honest and upright dealing, as having been sinister and fraudulent in their entire purpose. Is this court willing, after the lapse of sixteen years and the clear and convincing evidence of Mr. Baker before it, and in the absence of five important witnesses whose voices are silenced by death, to interpret the motives of Mr. Baker as fraudulent, and take away from him property upon which he has spent $10,977.13 to preserve, when the most optimistic tide land boomer that the appellee could produce at the trial testified that this property in 1897 was of a value less than one-half this sum? We do not believe this court will take such a view.

In January, 1897, the receiver, at the instance of the Comptroller of the Currency, took up these tide land contracts with the state. The acting comptroller, Mr. Coffin, stated in his letter of approval of this transaction that inasmuch as the contracts were assignable they could be disposed of at any time. Every possible effort was made to realize upon these tide land contracts—the creditors, stockholders

and the community generally having been circularized to this effect, but it was not until November, 1897, that Mr. Baker was able to sell any of them, having theretofore been offered only one dollar for each of the seven contracts which he held with the state, although he had made two annual installment payments thereon. He finally sold two of these contracts to Mr. Simpson at what he considered a profit of $50.00 each. No more tide land contracts were sold or assigned until March, 1899, and it was at that time, when Mr. Simpson was turning over block 429 through Anderson to W. D. Hofius & Company, that Mr. Baker repurchased block 430 from Mr. Simpson, and gave his note for the purchase price, which he subsequently paid. Much has been said about the fact that Mr. Simpson should sell to Mr. Baker this block for that figure. Two important facts must be kept in mind: First, Mr. Simpson was identified with Mr. Baker's electric light and power company, and they both had a large expectancy from this. Mr. Simpson was brought into this upon invitation of Mr. Baker, and therefore more than the usual obligation existed between them, intimate friends as they were. Second, tide land values at that time were so inconsequential as to really not be regarded with very great seriousness.

Mr. Simpson carried this property in his name for Mr. Baker at his instance, because Mr. Baker had been greatly involved and was covered up with judgments, and did not get these cleared off until 1905, at which time his father died and he came into possession of property from his father's estate. It was then that he prepared to take over the title of this property from Mr. Simpson, and it was then that he reimbursed Mr. Simpson for all moneys that he had paid out in preserving the property, and purchased from Mr. Simpson lease No. 181, embracing the harbor area in front of and adjacent to this property.

It will be remembered that Rotch and Turner, in fixing the time of the conversations with Mr. Simpson, stated that they occurred from one to three years after Mr. Baker repurchased this property. It is a matter of interest that, although Mr. Simpson held these two blocks for a year and a half, no witnesses were found who could testify that Mr. Simpson during any of this time ever suggested that Baker had any ownership or title to this property. So, in fact, the testimony of Rotch and Turner accords entirely with Mr. Baker's testimony, because he says now, and has claimed all the time, that he repurchased this property in March, 1899.

We will further discuss the testimony of these two witnesses later.

The facts in this case as disclosed from the foregoing statement taken from the record are sufficient argument in themselves. We shall, therefore, take up the various assignments of error and discuss the legal questions arising therefrom. We shall group these assignments of error for brevity under certain general subdivisions that will be designated as we further present the case.

THE COURT ERRED IN PERMITTING FRANCIS ROTCH AND LESTER TURNER TO STATE CONVERSATIONS WHICH THEY HAD WITH SOL G. SIMPSON WITH REFERENCE TO THIS PROPERTY.

It was in the latter part of 1900 that Francis Rotch fixes the date of his first conversation with Mr. Simpson:

"Mr. Simpson was turning a great many things over to me and of course I opened a great deal of his mail, unless it was marked 'Personal,' and I came across a notice from the Land Commissioner saying that there was a payment due and interest due on Block 430, and so I went to Mr. Simpson and asked him whether I should pay it or not * * *. That was in the year 1900—the end of 1900. I have refreshed my memory about that. He said, 'yes.' He said 'Pay that.' He says, 'That belongs to

Charlie Baker,' and then I said, 'Shall I pay it?' and he says, 'Yes, pay it.' And then I paid it and made the entry of it in my books and charged Mr. Baker with that payment, but that was all the conversation we had at that time as I remember it." (Tr. p. 89.)

And after a further question as follows:

"It came up again about two years later—I think 1902; I am not quite certain about that, and Mr. Simpson was hard up in those times. He had a good deal of property but did not have much money, and we had been selling off quite a lot of his property in order to obtain money, and I went to him again and I said: 'Now, can't we get rid of this Block 430?' I thought maybe at that time probably he got it from Baker or something of the kind. He said, 'No, Mr. Baker put that in my hands and I have to hold it in trust for him right along.' He said, 'We cannot dispose of that'." (Tr. pp. 89, 90.)

And further, in answer to a question by plaintiff's counsel:

"Q. Just the same, he told you in substance that he was carrying that property for Charlie Baker, or words to that effect?

A. Yes, sir.

Q. And that he never had any interest in it?

A. Yes."

Mr. Turner testified that in 1898 or 1899—he could not fix the date nearer—with reference to his conversation, as follows:

"The conversation came up in this way: I was

talking to Mr. Simpson in regard to tide land holdings that the bank held. It owned quite a large amount of tide lands and he was director of the bank, and I talked to him about the plans of the bank and in that connection I asked him about his own holdings down there. I knew that he held some tide lands. And he told me that a portion of those lands belonged to Charlie Baker—that he was carrying the title for him to accommodate him." (Tr. p. 91.)

And also the following in response to a question as to a later conversation:

"I do not know the occasion of it—I do not remember the occasion of it, but it occurred in the bank. It was with reference in some way incidentally to the properties and I asked him how he came to hold the title to that property that belonged to Baker. 'Well,' he said, 'Baker did not want it known that he had taken the property while he was receiver of the bank, and it might not bear investigation,' and he was carrying it for that reason." (Tr. p. 91.)

To the introduction of this testimony the appellants interposed objection that the same was hearsay, immaterial and irrelevant. The court permitted these witnesses to give this testimony upon the theory that it was a declaration by Simpson against his interest, and it is with this in view that we proceed to analyze the reason for this ruling. These witnesses both testified in substance that Simpson

stated that he was holding block 430 for Baker. If this testimony is true, Simpson had no interest in this block of tide land, and, therefore, the statement would not be against his interest. The only way in which it could be said that Simpson's statement to these two witnesses was a declaration against interest would be to believe what he said was false. If he did not hold it for Baker, then Mr. Simpson did not tell the truth, and his testimony would be disregarded. If he did hold it for Baker, then he had no interest in the property and his declaration would not be against interest, and, therefore, the testimony would not be competent. We respectfully submit that appellee must accept one or the other horns of the dilemma in which this theory places him with reference to the admission of this testimony, to-wit: That Simpson had no interest in the property, and, therefore, it is not a declaration against interest, or, if he had an interest in the property, then he told a falsehood when he made the statements to Rotch and Turner to the contrary effect.

## THE APPELLEE CANNOT DO EQUITY.

The decree of the court directs the payment of $10,977.13 to appellant by the present receiver, of

which $8,130.19 is principal and $2,846.94 interest; the "said principal being all the sums by the defendants expended in taxes upon the aforesaid Block 430 and Harbor Lease 181 and in payments directly or indirectly made to the State of Washington under the contract for Block 430 aforesaid and upon said lease, and should complainant fail so to do, he shall lose the benefits of this decree." (Decree Tr. p. 82.)

The first pertinent inquiry is: Has the receiver this money, or assets out of which to obtain it? The receiver testified in this case "that as receiver of the Merchants National Bank no funds had come into his hands, and that at the present time he is without funds, and that there are no assets of the bank so far as he knows excepting the claim which he is asserting in this action." (Tr. p. 190.) We need go no further than the testimony of the receiver himself to definitely prove that the receiver is without funds with which to pay this judgment, consisting of the payments that were made to the state and the taxes upon this property. We are then brought to the question of considering whether, if any creditors, stockholders, or other parties, who are speculating at the expense of the Comptroller of the Currency and of the receiver in this litigation, were to give the receiver this money,

the receiver could use that money for this purpose? We are presenting to the court under another head in this brief the power of the receiver to utilize funds in making purchases or payments contrary to the provisions of the statute. Any funds that might be contributed by people speculating in this law suit would become subject to the provisions of the law prescribing the extent to which these funds might be used for a purpose of this character. If the receiver could not have made the payments to the state from year to year out of the funds in his hands as these payments became due to the state, then certainly he cannot use the funds to reimburse another for having made these payments. This becomes at the present moment even more of a question than ever before. Up to one year ago the liability of Block 430 was subject to any lien or liens that might arise or be created in consequence of or pursuant to the provisions of the act of the legislature of the State of Washington providing for the filling of these tide lands. This act was approved March 9, 1893, and the contract No. 728, and all other tide land contracts, specifically provided in the body thereof that the contracts were issued subject to the provisions of this act. (Tr. p. 105.) While heretofore a lien was a mere possibility, now we are face to face with

an actual subsisting obligation, arising out of this right to fill, of some $80,000 and interest. Hence, any money that the receiver might pay, whether it was his own or presented to him by speculators, would be paid out under order of the court upon property subject to a lien of more than $80,000. In this connection we should not lose sight of the fact that after a lapse of sixteen years, while this property was developing from a valuation that was purely speculative, as was testified to by the appellee's own witnesses—one giving this speculative value at $4,800 and the other at $5,000—the property, according to the allegations of the bill, has now reached a valuation of $300,000, and during this time the appellant Baker has paid out in the preservation of this property more than twice the estimated speculative value placed upon the property in 1897, when he acquired it.

In view of the fact that the law has provided no way by which the receiver could make these payments, and the receiver has no funds with which to perform even though he had the authority, we submit that this court will not now lend its power to extend to the receiver rights which the law itself withholds.

## Testimony to Establish Fraud Must Be Clear, Unequivocal and Convincing.

The appellee has sought to make out his case by the thinnest kind of circumstantial evidence. He seeks from it to convict Mr. Baker, Sol G. Simpson and A. H. Anderson, the last two not now being able to defend themselves or their good names, of a fraud that amounts to a felony. He has no direct evidence upon the point, nor any inconsistent with the facts as they have been disclosed by the appellants in a clear and convincing way. It must be the theory of the appellee that because one or two real estate men estimated the tide land contracts to have a speculative value in excess of that for which the receiver sold them, that this is a badge of fraud, such as to warrant the court at this distant day, after a lapse of between 16 and 17 years, fixing in the appellee title which the appellee never had any right to acquire and could not hold, and if it involved the expenditure of any money the appellee in this action would not be authorized under the statute to invest funds in such a venture. The fact is the appellee has admitted that he has no assets, excepting the claim in this suit.

In the case of *United States vs. Maxwell-Land*

*Grant Co.,* 121 U. S. 325; 30 L. E. 949, 959, the court, quoting from the opinion of Mr. Justice Strong in a former decision, says:

"'Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear; never for alleged false representations, unless their falsity is certainly proved, and unless the complainant has been deceived and injured by them.' * * *

"We take the general doctrine to be that when in a court of equity it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

Fortunately we have a wealth of decisions by the Supreme Court of the United States upon every branch of the case at bar. We invite the court's attention to the case of *Prevost vs. Gratz, et al.,* 6 Wheat. 481; 5 L. Ed. 311, 315. Mr. Justice Storey delivered the opinion of the court and says in forcible terms:

"It is certainly true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not upon principles of eternal justice, to be admitted to repel relief. * * * But length of time

necessarily obscures all human evidence; and as it thus removes from the parties all the immediate means to verify the nature of the original transactions, it operates by way of presumption, in favor of innocence, and against imputation of fraud. It would be unreasonable, after a great length of time, to require exact proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that can fairly be expected in such cases, if the parties are living, from the frailty of memory, and human infirmity, is, that the material facts can be given with certainty to a common intent; and, if the parties are dead, and the cases rest in confidence, and in parol agreements, the most that we can hope is to arrive at probable conjectures, and to substitute general presumptions of law, for exact knowledge. Fraud, or breach of trust, ought not lightly to be imputed to the living; for, the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes, and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt."

A case from the 8th Circuit, that of *Maston vs. Noble,* 157 Fed. 506, quoting from page 508, says:

"Another well-established general rule governing courts of equity in cases of this kind which should be borne in mind is that the evidence adduced to set aside a written instrument for fraud must be clear, unequivocal, and convincing. *Atlantic Delaine Co. vs. James,* 94 U. S. 207; 24 L. Ed. 112; *Maxwell Land-Grant Case,* 121 U. S. 325, 380; 7 Sup. Ct.

1015; 30 L. Ed. 949; *United States vs. Budd,* 144 U. S. 154, 12 Sup. Ct. 575; 36 L. Ed. 384; *Chicago, St. P. M. & O. Ry. Co. vs. Belliwith,* 28 C. C. A. 358, 83 Fed. 437. In the first of these cases the Supreme Court said: 'Canceling an executed contract is an exertion of the most extraordinary power of a court of equity. The power ought not to be exercised except in a clear case, and never for an alleged fraud, unless the fraud be made clearly to appear, never for alleged false representations, unless their falsity is certainly proved'."

This Court has likewise spoken on this very important subject in the case of *Holton vs. Davis et al,* 108 Fed. 138, quoting from page 150:

"* * * As to the character of proof necessary to sustain the charges it must constantly be borne in mind that fraud is never presumed. It may, however, be inferred from facts and circumstances connected with the transactions; but in all cases of this character the fraud, collusion, or conspiracy alleged in the bill must be proven to the satisfaction of the court. The proof upon these points, in order to entitle complainant to any relief, must be clear, distinct, and certain. If there be any doubt or uncertainty, the relief asked for should be denied. 3 *Enc. Pl. & Prac.* 628, and authorities there cited; *Boyden vs. Reed,* 55 Ill. 458, 464; *Doughty vs. Doughty,* 27 N. J. Eq. 315, 320; *Baltzer vs. Railroad Co.,* 115 U. S. 634, 6 Sup. Ct. 216, 29 L. Ed. 505, and authorities there cited; *Lalone vs. U. S.,* 164 U. S. 255, 257, 17 Sup. Ct. 74, 41 L. Ed. 425. In the case last cited the court said:

"'The rule is of long standing, and is of universal application, that the evidence tending to

prove the fraud, and upon which to found a verdict or decree, must be clear and satisfactory. It may be circumstantial, but it must be persuasive.' "

Analyzing the evidence in this case in the light of these decisions, what do we find? The books of the receivership show the sale of contracts No. 727 and No. 728 to Sol G. Simpson, and the price paid therefor. If the receiver had sought to conceal anything in connection with this sale, he might well have omitted the name of Mr. Simpson. The special examiners in looking over these books knew that the sale had been made to Simpson, and at what price. They knew, as the books disclosed all these facts clearly, that the receiver had received for each of these two contracts $50 above the one payment made the state. No objection seems to have been made. Is there anything in this that would indicate fraud? On the contrary, these facts are spread out upon the books of the receivership as plainly as any other fact disclosed by these records. Further, these contracts had been a part of the record and files of the receivership up to the time they were sold to Mr. Simpson, and they were then assigned and delivered to him. This fact was known to the examiners. A special examination was made by Mr. Wing touching these tide land

contracts. Mr. Wing interviewed Mr. Simpson and Mr. Anderson, and apparently was entirely satisfied with the facts as he learned them. Dealing with this evidence in the fairest manner, there is not one item of testimony inconsistent with the facts as testified to by Mr. Baker, and from which fraud can be inferred. If it is to be concluded that any of those acts were fraudulent, then fraud must be *imputed* to these otherwise lawful and orderly acts of the receiver. The testimony of Rotch need not be seriously considered, because we do not believe that the manner of his testifying, and the way in which the statement was drawn out of him upon redirect examination by a leading question, will have any weight with this Court.

Much emphasis was placed by counsel during the trial upon the fact that the receiver did not specifically mention block 430 in his reports. Surely this cannot be regarded seriously in the light of all the other facts showing that the receiver kept these tide land contracts in his books by their numbers. The State Land Commissioner kept them by numbers, and when these various letters were received bearing upon block 430 they were directed to be filed with tide land contract No. 728, not with tide land block 430. (Tr. p. 254.) The constant

handling of these tide land blocks was by numbers and not by blocks. The reports upon these sales and with reference to these tide land contracts were as full and explicit as the reports upon any other item of business of the receivership. Much was said about Schedule E under which the receiver made a report of the sale to Simpson. But we do not see how it could have been made much plainer unless the receiver had attached a photograph of the property and of the purchaser to the report. If Columbus T. Tyler, who is now dead, were here to testify he might throw some light upon just why the reports were made in all particulars as they were. They were upon forms furnished by the Comptroller. Here again the appellants are shorn of testimony by lapse of time, which is not explained by the appellee. At any rate the manner in which these contracts were handled would not have permitted of the possibility of an error. When these contracts were issued by the Commissioner of Public Lands they were in duplicate. One copy was retained by the Commissioner of Public Lands, and the other was delivered to the receiver and formed a part of the physical assets of the trust, and in the possession of the receiver. (Tr. p. 276.) When the sale was made to Mr. Simpson, the copy which the

receiver had was assigned and delivered to Mr. Simpson, and the contract was no longer a part of the securities on file with the receiver, (Tr. p. 276) but the money was put in its place, (Tr. p. 194) and was then transmitted to Washington in the next quarterly report. (Tr. p. 200.)

## Laches and the Statute of Limitations as Applied to This Case.

In his bill the appellee alleges as follows:

"The facts herein alleged were wholly unknown to any of the creditors and stockholders of said bank, and to plaintiff and the Comptroller of the Currency until the year 1913, and were, until that time, concealed from them by the defendants, as above set forth, and were first discovered by the Comptroller of the Currency on or about the 1st day of February, 1913." (Tr. p. 12.)

No further allegation whatsoever is made to justify the delay of sixteen years in bringing this action. No effort is made in the bill to bring the case within the decisions of the Supreme Court of the United States and other leading decisions upon the question of laches by alleging *what* was discovered, *how* such discovery was made, and *why* it was not made sooner. These become important questions, particularly in view of the fact that the

appellee's witnesses were all old time residents of the City of Seattle. Mr. Reed, the son-in-law of Mr. Simpson, is a native born; Mr. Rotch has resided in the State twenty-six years and in Seattle seventeen years. Mr. Turner has resided in Seattle twenty-six years. There is nothing in the bill, nor in the proof, which does not negative the possibility that all the facts which the appellee now brings forward at this late day, and after the death of all the principal witnesses, were not known years ago, and the delay in the action was simply awaiting until time had reaped its harvest among the chief witnesses and then bring forward this cause of action.

Before discussing the facts at length as they effect these questions now under consideration, let us inquire as to the law upon these questions.

Sec. 159, Sub-sec. 4, *Rem. & Bal. Code*:

An action for relief upon the ground of fraud, can only be commenced within three years after the cause of action shall have accrued, but the cause of action in such case shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

The English statute, that of 3 and 4 William IV, enacted:

"The cause of action is deemed to have accrued, and not before, the time at which such fraud shall, or WITH REASONABLE DILIGENCE MIGHT, have been first known or discovered."

That portion of the statute which provides that the action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud had its origin in equity. Equity courts took the view that actions for relief on the ground of fraud are not affected by the lapse of time, however long, so long as the appellee remains, *without any fault of his own,* in ignorance of the fraud. But equity aided the diligent and not the negligent; was opposed to stale claims, and would not permit a party to prolong by his own laches the time during which he might apply for relief. The time within which the party aggrieved might bring his action after discovery of the facts constituting the fraud, or *after the time when he ought to have discovered them,* was a matter to be determined wholly upon the discretion of the chancellor. Also if the action was founded upon occurrences that had transpired a long time before and appellee alleged that he had not discovered the fraudulent facts until recently, the question of

whether or not he had been guilty of laches was likewise a discretionary matter for the chancellor.

The statute in substantially the terms of the Washington statute has been enacted in a large number of the states, though some states have enacted it in the form of the statute of William IV.

Of the states that have enacted the statute in the form of the Washington statute, all, save possibly the State of Kansas, have construed the statute in the light of equity so that the statute, as interpreted, practically reads that the action shall not be deemed to have accrued until the party aggrieved shall have discovered, OR OUGHT TO HAVE DISCOVERED, the facts constituting the fraud. Therefore, the only discretion that the chancellor exercised, of which the statute has deprived the modern court, is the limit placed upon the time for bringing the action after actual or implied knowledge of the fraud—the question of whether or not the plaintiff has been diligent, if the action is commenced after the expiration of the statutory period, still being a question for the discretion of the court.

Therefore, where an action is brought after the expiration of the statutory limit (three years in Washington) it behooves the appellee to *aver* and *prove* (the burden being upon him) that his action

is covered by the "saving clause" of the statute—that is, that the apparent bar or laches was not due to any fault or lack of diligence on his part.

"The burden is on the plaintiff to aver and prove that he did not discover and could not reasonably have discovered the fraud or concealment prior to the statutory period before bringing suit."
19 *Am. & Eng. Enc. Law,* 333.

In the case of *Felix vs. Patrick,* 145 U. S. 317, 36 L. Ed. 719, 726, decided in 1891, the bill was dismissed on demurrer because of plaintiff's laches, the court saying:

"While, as alleged in the bill, their discovery of this fraud may have been contemporaneous with their becoming citizens of the United States, there is no palpable connection between the one fact and the other, and we think the bill defective in failing to show how the fraud came to be discovered, and why it was not discovered before. A simple letter to the Land Department at any time after this scrip was located would have enabled them to identify the land, and the name of the person who had located it; and it is difficult to see why, if they had ever suspected the misuse of this scrip, they had not made inquiries long before they did, * * * 'the party who makes such appeal should set forth in his bill, specifically, what were the impediments to the earlier prosecution of his claim; * * * otherwise the chancellor may justly refuse to consider his case, upon his own showing, *without inquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.*'"

The leading case upon this question is that of *Hardt vs. Heidweyer,* 152 U. S. 546, 38 L. Ed. 548, 552. This case was decided in 1894. A failing debtor paid to some of his creditors sums largely in excess of their demands by giving notes and having judgment immediately entered thereon. It was held in this action that laches for a period of only five years barred the action. The plaintiff alleged that he had caused an investigation to be made at the time of the failure and shortly after rendition of the judgment on the notes, but that the preferred creditors represented that the notes were given in settlement of *bona fide* claims against the debtor and were not in excess of their claims. The plaintiff also further alleged that the defendants had fraudulently concealed the fact of such excessive payments made in pursuance of a design to appropriate substantially all the assets of the debtor. The action was dismissed on demurrer. Mr. Justice Brewer wrote the opinion of the court and reviewed a large number of cases and set forth at considerable length the requirements of the bill where the plaintiff sought to avoid the presumption of laches or the bar of the statute. This is an able discussion upon a vital question that is now before this Court in the case at bar. The court says:

"It is well settled that a party who seeks to avoid the consequences of an apparently unreasonable delay in the assertion of his rights on the ground of ignorance must allege and prove, not merely the fact of ignorance, but also *when* and *how* knowledge was obtained, in order that the court may determine whether reasonable effort was made by him to ascertain the facts. Thus, in *Stearns vs. Page,* 1 Story, 204, 215, 217, Mr. Judge Story observed:

"'General allegations, that there has been fraud, or mistake, or concealment, or misrepresentations, are too loose for purposes of this sort. The charges must be reasonable, definite, and certain as to time, and occasion, and subject-matter. And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches. * * *'

"On appeal this decision was affirmed, 48 U. S. 7 How. 819, 12 L. Ed. 928 * * *.

"Similar declarations may be found in several subsequent cases: *Badger vs. Badger,* 69 U. S. 2 Wall. 87; 17 L. Ed. 836, in which is found this quotation:

"'The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when

he first came to a knowledge of the matters alleged in his bill.'

"*Godden vs. Kimmell,* 99 U. S. 201, 211, 25 L. Ed. 431, 434; *Wood vs. Carpenter,* 101 U. S. 135, 140, 25 L. Ed. 807, 808, in which this court said:

"'A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated *when it was made, what it was, how it was made,* and *why it was not made sooner.*' * * *

"Tested by this rule, it is apparent that this bill must be held deficient in not showing how knowledge of the wrongs complained of was obtained by the plaintiffs. It is alleged that they were ignorant, and now have knowledge and that they acquired such knowledge within a month prior to bringing the suit; but how they acquired it, and why they did not have the same means of ascertaining the facts before, is not disclosed. * * * Plaintiffs * * * made no inquiry or challenge of the integrity of the transaction for nearly five years. Such indifference and inattention must be adjudged laches. Upon this ground alone, * * * the decree of the Circuit Court (dismissing on demurrer) is affirmed."

Let us stop for a moment now and consider the evidence in the case. By what testimony can the appellee seek to avoid the effect of this rule of law that it is incumbent upon him to prove when and how he discovered the facts which he sets forth in his bill, some of which he has attempted to prove at the trial? Is there anything in this case that indicates *when* the appellee became possessed of

the information that Mr. Rotch or Mr. Turner testified to, or that is embraced in the writngs and other documentary evidence? May not the appellee, or the Comptroller, or the creditors or stockholders of the Merchants' National Bank, or all of them have known of these facts for fourteen or fifteen years? The appellee has wholly failed to disclose when any of this evidence came to his knowledge. The case now stands upon the bare allegation of the bill that these facts were wholly unknown to the appellee prior to February, 1913.

The appellee fails in another vital point to disclose to the court *how* he discovered these facts. It is not for a litigant who has suffered the statute to run five times its length to come into court and ask for relief without explaining how these facts were disclosed, so that the court may judge as to whether the means of ascertaining these facts were not as completely available fifteen years ago as now. There is nothing to indicate how they came to learn that Mr. Turner or Mr. Rotch might be possessed of some of these facts. There is nothing to indicate how they became acquainted with the fact that Mr. Mark Reed, a son-in-law of Sol G. Simpson, might be possessed of some of these facts. It does appear upon the face of the record that

Mr. Turner and Sol G. Simpson were identified together in the First National Bank; that Mr. Rotch was a clerk of Mr. Simpson; that Mark Reed was a son-in-law of Mr. Simpson; that all these men had resided in this community for the last sixteen years. Now what is there in this record that discloses to this Court why these parties could not have learned all that these men testified to as well fifteen years ago as now? There is an entire absence of evidence disclosing to the Court when or how the appellee became possessed of any of this information, but now, after a lapse of over sixteen years, after Sol G. Simpson has been dead for eight years, and Mr. Seeley, the special bank examiner, upon whose recommendation these assets were sold by Baker as receiver and who secured the order of the court for the sale thereof, is dead; after Mr. Columbus T. Tyler, the bookkeeper of the receiver and who made out the reports, is likewise dead; after Mr. Hofius, of W. D. Hofius & Company, the man who purchased some of these tide lands in 1899, is dead; after Mr. Anderson, another one of the principal participants in these transactions, came to a point in life where he was suffering from an incurable disease which had so badly affected his memory and health that he had lost all

trace of events, and from which disease he died within a few days after the trial, will the appellee be permitted, under all these circumstances, to receive at the hands of this Court favorable consideration and not disclose to the Court when and how he became possessed of every particle of information which has been produced at this trial? This Court does not know at the present time but that the appellee, the Comptroller of the Currency, the stockholders and the creditors of the Merchants' National Bank are the ones who have systematically concealed all the information about this bank until all these principal witnesses shall have died, and then pounced in upon Mr. Baker, left shorn of all the evidence he might have produced had the appellee brought this action in season.

The appellee is seeking equity and, after so great a lapse of time, when the circumstances of all transactions must necessarily more or less fade from one's recollection, there must be the clearest and most convincing proof that the appellee has used all due diligence, and the only way this can be demonstrated to the Court, as has been so clearly held by the Supreme Court of the United States as necessary, is to disclose when he came into possession of these facts and how he came into their

possession, so that the court may determine from this evidence whether the appellee has acted with all due diligence.

The appellee asserts to this Court that he has discovered certain conversations had between Sol G. Simpson and Mr. Rotch. Those conversations were had about fourteen years ago. Mr. Rotch has resided in this vicinity all this time. When, in these fourteen years, did the appellee discover this evidence, and how did he come to discover it? If it is because of the fact that Mr. Rotch was the secretary of Mr. Simpson, it must be assumed that every one who knew Mr. Rotch in those days knew his relations with Mr. Simpson and he could have been inquired of as to this matter a dozen or more years ago as well as now. Mr. Lester Turner has resided in this community for a quarter of a century. Every one knowing Mr. Turner is familiar with the fact that he and Sol G. Simpson were associated together in the affairs of the First National Bank and were upon its board of directors at the same time. This is no new fact and the appellee cannot say that he has so recently discovered this. What led the appellee to search for Mr. Turner or Mr. Rotch to get this statement from them? The

record is as silent as the graves of the five dead men who would be important witnesses here.

As Mr. Justice Brewer has so well and forcibly said: "A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff make any particular discovery it should be stated *when* it was made, *what* it was, *how* it was made and *why* it was not made sooner." The record is absolutely silent upon these controlling and important points.

## What Constitutes Discovery Within the Meaning of the Statute?

Whether or not the appellee has slept on his rights is to be determined by the facts in each particular case. There are a multitude of circumstances that enter into a decision of this question.

Mr. Justice Brown in the case of *Patterson vs. Hewitt,* 195 U. S. 310; 49 L. Ed. 217, announces in forcible language some of these considerations. In this case the plaintiffs filed their bill in 1893 against the defendants to enforce a trust, which is alleged to have existed between the plaintiffs and the defendants, by which they sought to recover one-fourth interest in two locations made in the name of the defendants nine years previously. The bill

prayed for an accounting. The property had very materially increased in value. The court says:

"The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if the day after, it will be defeated. *In suits in equity the question is determined by the circumstances of each particular case.* The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed, complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control—are all material to be considered upon the question whether the suit was brought without unreasonable delay."

The same general doctrine is announced in *Ferrell vs. Lord,* 43 Wash. 667, where our Supreme Court clearly holds:

"Where a case is of purely equitable cognizance, in the application of the doctrine of laches courts

of equity act upon their own inherent doctrine of discouraging, for the peace of society, ancient demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights."

This Court in the recent case of *Newberry vs. Wilkinson,* 199 Fed. 673, 688, which is a case arising in Spokane, speaks with no uncertain terms upon this important question. When the plaintiff was nineteen years of age in a conversation with his stepmother she told him that if he would bring a suit he might recover an interest in his mother's property, referring particularly to the Carnegie Library site. This is the only suggestion or information which he had on the subject, and four years afterwards he brought the suit on account of misconduct of his guardian, and he was denied the right to prosecute the case on the ground of laches.

"It is one of the settled general rules in this class of cases that if the party seeking to avoid the operation of the statute of limitations, or to excuse the delay which would, in the absence of a sufficient excuse, amount to such laches as would defeat his right of action, possessed information or knowledge of extraneous facts and circumstances, or, in other words, of matters in pais, which, although not directly tending to show the existence of a prior conflicting right, are sufficient to put him, as a prudent person, upon inquiry, he is then charged with constructive notice of all that he might have learned

by an inquiry prosecuted with reasonable diligence. *Pom. Eq. Juris.* §610. It is said by the same author that from the existence of such circumstances 'the legal presumption arises that he has obtained information of what he might have thus learned. In every such case the first question is whether the facts of which the party has information are sufficient to put him upon an inquiry, so as to raise the *prima facie* presumption. The further question is then presented whether he has made a due inquiry without discovering the truth, so as to overcome the presumption and defeat the notice, or whether he has so neglected this duty that the presumption remains unshaken and the notice effective.' "

"Again, the court says, in *Nash vs. Ingalls,* 101 Fed. 645, 648, 41 C. C. A. 545, 548:

" 'The law requires that, in order to relieve himself from the consequences of delay in seeking a remedy for a wrong, the party should have given reasonable attention to his own affairs, and he is chargeable with knowledge of such facts as such reasonable attention would have afforded him.'

"So also, in *Foster vs. Railroad Co.,* 146 U. S. 88, 99, 13 Sup. Ct. 28, 32 (36 L. Ed. 899):

" 'The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts.' "

The Supreme Court of the United States in the case of *Galliher vs. Cadwell,* 145 U. S. 368; 36 Law Ed. 738, reviews at great length the cases bear-

ing upon what constitutes laches. This case arose in the City of Tacoma, and was an action to quiet title. The question as to the increase of the value of the property was one of the things that entered into the decision of this case. Mr. Justice Brewer, after reviewing many cases, says:

"But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

The court refused the relief prayed for because of the large increase in the value of this property between the time when it was alleged the acts occurred out of which the action grew, and the time of bringing the suit.

The case of *Duxbury vs. Boice, et al.,* 72 N. W. (Minn.) 838, is well considered and bears directly upon the question of what constitutes discovery. This was a case to set aside a conveyance on the ground that it was made with intent to defraud creditors, and to subject the granted premises to the payment of a judgment. The debt on which the judgment was rendered matured in 1878; the conveyance attacked was executed in 1881, and re-

corded forthwith. This action was begun in 1893, nearly 12 years after the alleged fraudulent conveyance, and about nine years after the rendition of the judgment. The court says:

"In granting relief on the ground of fraud the foundation principle of courts of equity was that the party defrauded is not affected by the lapse of time so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. * * * But equity aided the diligent, and not the negligent. It was opposed to stale claims, and would not permit a party to prolong, by his own laches, the time during which he might apply for relief. Hence in actions in equity, the rule was that the means of knowledge were equivalent to actual knowledge; that is, that a knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud, was equivalent to actual discovery. Hence, in equity, where there was no statute of limitations, but merely an application of the doctrine of laches, the burden was on the plaintiff not merely to prove that he did not, in fact, discover the fraud until within a reasonable time before he filed his bill, but also to show by the facts and circumstances connected with the fraud and its discovery that his failure to discover it sooner was consistent with reasonable diligence on his part, and not the result of his own negligence. * * * But in every instance, so far as we are aware, the courts have construed such statutes in accordance with the equity rule, and hold, without reference to the particular language used, that the means of discovery are equivalent to actual discovery, and that a party must be deemed

to have discovered the fraud when, in the exercise of proper diligence, he could and ought to have discovered it."

Again, in the case of *First National Bank of Shakopee vs. Strait,* 73 N. W. (Minn.) 645, we find this doctrine well expressed. Strait, Howe, *et al.* were partners in a flour milling enterprise. Strait and Howe were also president and cashier, respectively, of the plaintiff bank. In 1885 and prior the bank held the note of the milling company for $10,000. In October, 1885, Howe (possibly with the knowledge of Strait) accepted the renewal note of the milling company to take up the original note. The renewal note was due January 1, 1886, but in November, 1885, Howe stamped it "Paid", and attached thereto his personal note to cover it. That the note had not been paid was kept from the board of directors until 1893 when Howe died, and Strait died shortly thereafter. The renewal note was given a bank number and kept in the bills receivable book. Howe died insolvent, and this is an action against Strait's administrator. The milling company's property had burned and the partnership had terminated in 1887. This action was begun and the partnership had terminated in 1887. This action was begun between eight and nine years after the

renewal note matured. The Minnesota statute is substantially the same as the Washington statute, except that the Minnesota period of limitation is six years. For the purpose of taking the case out of the statute plaintiff alleged that Howe and Strait fraudulently concealed from it that the original note was renewed instead of being paid, and falsely stamped the renewal note as paid, and fraudulently concealed the fact that the latter note and the debt which it represented had not been paid, and that the bank did not discover the facts constituting the fraud until 1894. The court said:

"The burden was on the plaintiff to prove the fraud, and that it did not discover it until within six years before the death of Horace B. Strait. * * * But the facts constituting the fraud are deemed to have been discovered when with reasonable diligence they could and ought to have been discovered. The mere fact that the aggrieved party did not actually discover the fraud will not extend the statutory limitation if it appears that the failure to sooner discover it was the result of negligence, and inconsistent with reasonable diligence. * * * The directors of the bank had monthly meetings; also an examining committee, whose duty it was to examine the books and assets of the bank."

Shiras, Judge, in *Thompson vs. German Ins. Co. et al.,* 77 Fed. 258, discusses this principle of law with great clearness.

Bill by receiver of an insolvent national bank to collect an assessment made by the comptroller on 100 shares of stock defendant owned until about six months before the bank was closed by the comptroller. Plaintiff alleges that defendant transferred this stock without consideration to one Koehler, who was judgment proof, for the purpose of escaping liability on it. Fifty shares were transferred to Koehler in September, 1890, and 50 shares in January, 1891, and the bank was closed and receiver appointed in July, 1891, and that 90% assessment was made upon all stock in August, 1892. This action was begun in October, 1896, over four years (the statutory limit in Nebraska) after the assessment became due. The first receiver appointed in 1891 served until January, 1895; whereupon the present receiver, plaintiff Thompson, was appointed. It was averred that the fraudulent acts recited were not known to the comptroller nor to the receivers appointed by him until in February, 1896. The court said:

"If a party suffer an injury or wrong by reason of a fraud practiced by another, his right to a remedy in equity will not be affected by the lapse of time until discovery of the fraud is had, provided he is not guilty of negligence in ascertaining the facts."

The court quotes approvingly from *Hardt vs. Heidweyer,* 152 U. S. 547, 14 Sup. Ct. 671, and *Wood vs. Carpenter,* 101 U. S. 135. The court further says:

"When the receiver was appointed, and the comptroller ordered the assessment * * * it became the duty of the receiver to enforce the payment of the assessment thus made * * * and the proper performance of this duty required action on his part. The books of the bank, which were, of course open to the receiver, showed that the insurance company had transferred the stock in question to Koehler. As the assessment upon these 100 shares of stock was not paid by the present holders, it was incumbent upon the receiver to take steps to enforce the payment; but it is not shown that any action was taken to that end. It is averred in the bill that Koehler at the time of the transfer of the stock to him was an attorney, residing at Omaha; that he was in the employ of the insurance company, and was without capital. It is not averred that these facts were not in fact known to the receiver from the date of his appointment. * * * It is clear that this denial of knowledge cannot be intended to apply to the fact of the transfer of the stock by the insurance company to Koehler, and to the subsequent transfer thereof recited in the bill, because these appear on the books of the bank, and must have been known to the receiver. * * * It must be held that the receiver knew, or else was grossly negligent in not knowing, that the insurance company had transferred the stock in question to Koehler; and the means of knowledge were open to the receiver to ascertain all that is now charged in the bill with regard to Koehler. It is not averred that the receiver ever made the slightest inquiry

into the facts of the transfer to Koehler, or of the subsequent transfers of the stock that are set up in the bill. * * *

"And as it is not averred that the complainant ever made an inquiry, or did anything looking to an ascertainment of the facts surrounding the transfer of the stock to Koehler, it follows, if complainant's theory is correct, that by simply remaining wholly inactive the complainant could prevent the statute from beginning to run. On behalf of the diligent, equity holds that in cases of fraud the limitation begins to run from the discovery of the fraud, or from the discovery of facts sufficient to put a prudent person on inquiry; but to the negligent equity grants no relief."

This is a clear-cut case, is not complicated by the death or incapacity of any of the parties, any change in values, nor by any interests of innocent third parties. It will be noted that many of the circumstances and facts surrounding it are identical with the case at bar, and the period of laches was for only a little over four years.

The case of *Wood vs. Carpenter,* 11 Otto 135, 143; 25 L. Ed. 807, 808, is a leading case bearing upon this question. The plaintiff had recovered a judgment against the defendant in 1860. The defendant in the year 1850 entered into a fraudulent conspiracy with his brother to encumber his real estate and hide away the title so that the property should not be sold to pay his debts, but in the end

to inure to his benefit, and thereafter transferred the title to all his real and personal estate to his brother, thus preventing plaintiff from levying executions upon his judgments. In 1864 the judgments were sold to a relative of the defendant for 50% of their principal and interest, after which title to the property was transferred back to the defendant. It was not until about this time that the plaintiff had actual knowledge of the fraudulent conveyances. The statute of limitations was set up as a defense. On the question of the records the court recites as follows:

"The conveyances to Alvin and Keller were on record in the proper offices. If they were in trust for the defendant, as alleged, proper diligence could not have failed to find a clue in every case that would have led to evidence not to be resisted. With the strongest motives to action, the plaintiff was supine. If underlying frauds existed, as he alleges, he did nothing to unearth them. It was his duty to make the effort. * * *

" 'The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.'

"A party seeking to avoid the bar of the Statute on account of fraud must aver and show that he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it."

To the same effect is *Teall vs. Slaven,* 40 Fed. 774, 780, where the court says:

"* * * 'the party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clew to the facts which if followed up diligently, would lead to a discovery is, in law, equivalent to a discovery—equivalent to knowledge.' * * *"

No better discussion of this important question is found than that by Chief Justice Fuller in the case of *Hammond vs. Hopkins,* 143 U. S. 224, 274; 36 L. Ed. 134, 153. This was an action to charge former trustees of the estate of plaintiff's ancestors who had perpetrated alleged frauds by purchasing through a third party portions of the *trust res.* This action was begun nineteen years after the commission of the alleged fraud. The sale of the property to the "dummy" was a matter of record, as was also the subsequent conveyance from the "dummy" to the trustees. Also the accounting of the trustees with the Orphan's Court was open to the plaintiffs, from which records any fraudulent acts of the trustees could have been ascertained. Plaintiffs allege that they obtained actual knowledge of the fraudulent acts only a few days before the bringing of the action, when an attorney who had interested himself in the case had investigated the

records and ascertained the fraudulent conduct of the trustees. The court says, page 153:

"Where there has been no change of circumstances between the parties and no change with reference to the condition and value of the property, a court of chancery will run very nearly if not quite up to the measure of the Statute of Limitations as applied in analogous cases in a court of law. But where there has been a change of circumstances with reference to the parties and the property, and still more where death has intervened, so that the mouth of one party is closed * * * the courts limit very much, in such cases, the measure of time within which they will grant relief.

"In all cases where actual fraud is not made out, but the imputation rests upon conjecture, where the seal of death has closed the lips of those whose character is involved, and lapse of time has impaired the recollection of transactions and obscured their details, the welfare of society demands the rigid enforcement of the rule of diligence. The hour glass must supply the ravages of the scythe, and those who have slept upon their rights must be remitted to the repose from which they should not have been aroused."

What are the facts in this case, which it may be said existed, which if followed up would have put this appellee upon notice that Baker since March, 1899, has been the owner of the property, and that since 1905 has made no secret of such ownership.

In the first place the evidence shows that Mr. Baker's enemies were constantly on the watch to

find some ground upon which to criticise his administration as receiver. The sale of these tide land contracts No. 727 and No. 728 called forth such criticism by Mr. Baker's enemies in the opposition electric power companies that the Comptroller of the Currency sent Mr. Wing, a special examiner, to Seattle for the specific purpose of investigating this transaction. (Tr. p. 267.) After Mr. Wing had made the usual examination of the books and affairs of the receivership and finding everything regular, he then stated to the receiver that he had been particularly charged to investigate the complaints with reference to the purchase by Anderson and Simpson of these tide lands. The examiner did not state further the extent of these complaints. (Tr. p. 268.) Mr. Wing was informed of the prices at which these contracts had been sold, and he went to West Seattle and examined the tide lands themselves, in so far as such tide lands covered deeply with water at low tide and located at the nearest point a half mile from the shore, were a subject of examination. The receiver then discussed with Mr. Wing the value of these tide lands and the market conditions surrounding them. Mr. Wing then interviewed Mr. Simpson and Mr. Anderson, and a great many people around Seattle, including bankers and

business men. (Tr. pp. 230; 267-269.) Mr. Wing then reported to the Comptroller of the Currency as to the result of his investigation. (Tr. p. 268.) It seems, after Mr. Wing took a view of this property, he interviewed the receiver, Mr. Simpson, and Mr. Anderson with reference to the transaction, investigated among the citizens, including bankers and business men, of Seattle, as to the value of these tide lands, that he became convinced that the transaction was a *bona fide* one, and was for the interest of the receivership. This report of Mr. Wing to the Comptroller of the Currency must be accepted as to the facts which could be proven if Mr. Anderson and Mr. Simpson were alive. It must be accepted also as an approval by the Comptroller as to what Mr. Baker did at that time, and the appellee will not now be permitted, after a lapse of sixteen years and the intervening deaths of these important witnesses, to go back and open up a subject which was then closed. The Comptroller of the Currency was then put upon notice by Baker's enemies that these transactions should be inquired into; he made the investigation; satisfied himself as to the correctness of the transactions and of their *bona fide* character, and yet today another person occupying the same official position seeks to go back these long

years and make a new inquiry after such lapse of time as does not permit of establishing by living witnesses the truth of these transactions, as was evidently learned at that time and which was sufficient to satisfy the Comptroller of the Currency that they were all right.

At the risk of repetition we inquire again why the appellee did not have Mr. Wing present to testify, if he is still living—which we do not know—or, in the absence of Mr. Wing, why his written report was not introduced in evidence, or its absence in some way explained? The appellants could not do it, and in fact were denied the right upon the objection of the attorneys for the appellee to interrogate the Comptroller upon the simplest questions which affected this case vitally. (Tr. p. 73.) But we need not stop with the report of the special examiner, Mr. Wing, and the subsequent approval of the Comptroller of the Currency. In April, 1899, receiver Frater and his attorneys were put upon notice to make a searching inquiry into all of these matters, and the matters were submitted to the attorneys for the receiver and they investigated them and stated that the same were regular. (Tr. p. 171.) All five of the witnesses who are now dead were then living, and if they were not interviewed

and the attorneys for the receiver satisfied from that source, it is fair to presume that had they made the investigation of the facts then, as had Examiner Wing done a year previously, they would have come to the same conclusion as Examiner Wing. We have therefore then the benefit of the approval of these transactions by two different parties, who had the benefit of the testimony of which we are now deprived, and we submit it is only fair to say that if Anderson, Simpson, Seeley, Tyler and Hofius were now living, or if Wing was obtainable, the appellants today would be able to establish from the same sources, with the same convincing testimony, the *bona fides* of these transactions as it had been established on two previous occasions.

In 1905, Mr. Baker paid Mr. Simpson what was due him, and at the same time purchased Harbor Area Lease No. 181 and paid him therefor. As a part of this transaction he gave to Mr. Simpson's agent and son-in-law, Mr. Reed, a check for the balance due the state on account of the tide land contract, and this personal check of Mr. Baker was sent to the Commissioner of Public Lands, was there protested and passed back through the banks. Mr. Reed then wrote to the Commissioner of Public Lands calling his attention to this Baker check, and

asking him to withhold the issuance of the tide land deed until the check was paid. This all constituted a part of the records of the Commissioner of Public Lands in 1905. The letters were filed with these contracts.

Again, Mr. Baker himself wrote to the Commissioner of Public Lands on October 16, 1904, making inquiry about the Harbor Area Lease in front of this block. Again, Brockett wrote several letters to the Commissioner of Public Lands with reference to this block, and the letters were filed with tide land contract No. 728. These letters written by Mr. Brockett were upon the letterhead of the Seattle-Tacoma Power Company, which designated Thomas B. Hardin as general attorney, and Norwood W. Brockett as the assistant attorney. It was commonly and universally known in Seattle that Mr. Hardin and Mr. Brockett were the personal attorneys of Mr. Baker and his interest. (Tr. p. 273.) Again, in 1907, Judge Frater, who sat as judge of the Superior Court, and was likewise receiver of the Merchants' National Bank, awarded to Mrs. Baker two hundred and fifty shares of the capital stock of the Seattle Water Front Realty Company —the decree disclosing that the settlement of the property relations between the plaintiff and defen-

dant were just and proper, and that the same were approved. It cannot be reasonably supposed that the court would have signed such a decree as this without knowing the details of the property settlement as the recitals in the decree are very full. Again, Judge Frater knew, and has known for all these years that A. S. Norton was the attorney for Mr. Baker as well as for himself, and any correspondence which Mr. Norton may have had with the Commissioner of Public Lands, or any deeds that may have been issued by the State to Norton, and by Norton to the Seattle Water Front Realty Company, especially upon these tide lands, should have prompted immediate inquiry. Again, it is shown that some years ago the Bank of Suffern in New York, made a loan upon Mr. Baker's stock in the Seattle Water Front Realty Company, and in ascertaining something as to its value corresponded with the Seattle National Bank, and it is a well known fact that one of the attorneys for the appellee is upon the board of directors and attorney for, and largely interested in this bank. Again, it is shown that in 1906 or 1907, the real estate firm of McGraw, Kittinger & Case, of Seattle, corresponded with Mr. Baker with reference to this block, and sought to get a price from him thereon.

We stop at this point and ask can it be seriously questioned that the appellee did not have years ago ample means of discovering any one of the half dozen clues which if followed up would have led to a disclosure of every item of information which he has now brought to the attention of the court? We need not go back to comment further upon the fact that the testimony of Reed, Turner and Rotch were just as much available to this appellee then as now.

We have discussed at some length the question of laches and what constitutes discovery. We desire to invite the Court's attention to the opinion of the trial court, as disclosing the fact that the basis upon which the decree in this case rests is that of a legal error that existed in this case from November 26, 1897. The position which the honorable trial court takes is—

(a) That the receiver had a right to buy these tide land contracts.

(b) That these tide land contracts were real estate.

(c) That real estate could not be sold without an order of the court.

(d) That an order of the court had not been obtained authorizing the sale of real estate.

(e) Hence, the sale to Simpson was void.
112 Fed. 507.

After reciting portions of the order obtained by Examiner Seeley on October 9, 1897, which the examiner, the receiver and the Comptroller of the Currency himself interpreted as embracing all property of the estate, the court holds that the receiver never had authority to sell this property. We are then face to face with the question that if the lower court be correct in this, the right to set aside the sale to Simpson has existed for seventeen years, and that right appeared upon the face of the record. Where one seeking redress has a complete remedy, he cannot lie idly by for seventeen years and then come in and say that he has discovered another remedy, and maintain his action upon this so-called discovery of an additional remedy. How can the appellee remain in this court upon the face of the findings of the lower court, that if the appellee had brought an action seventeen years ago he could have set aside all the proceedings of the receivership as it related to the transfer of this property to Simpson. The court holds that the sale from Baker to Simpson is void. If it was void then the rights of the estate have been complete for seventeen years and

the record of these proceedings was disclosed then as fairly as now. The receiver will be presumed to have known his legal rights, and the obligation would rest upon him to assert those legal rights promptly upon their discovery, and inasmuch as the discovery was a matter of his own negligence, because it existed in fact upon the records of the receivership, there can be no other conclusion than that the receiver had the open and unobstructed means of discovering seventeen years ago that this sale to Simpson was fraudulent. This position is unanswerable, for upon the theory announced by the court below that the sale was void for want of a proper order, the right was then complete to recover this property and not wait for seventeen years, nor wait until they might consider themselves in the position of having some other facts which were no better in their potential character in accomplishing the desired results than those which appeared upon the face of the record from the beginning.

The lower court disposed of the whole question of laches in the following language:

"It is next contended that the plaintiff is guilty of laches and should not be permitted to prosecute this action. I do not think that this suggestion has any force under the evidence of this case. Lapse of

time is no bar, and laches cannot be asserted until knowledge is brought home to the plaintiff, or such notorious condition or relation to the property in issue by the defendant, that the plaintiff should have known, and such condition is not disclosed by the evidence."

212 Fed. 512.

Yet, in the preceding sentence the court holds that the receiver never had any authority to make the sale to Simpson, though the order has been on record for seventeen years, and if the receiver had exercised the right which the court here finds he possessed all these years, providing he had exercised this right timely, he would have been entitled to the same results as are accorded him by the decree of the court at this late date. We need not discuss the other facts as to the notorious condition of Baker's relations to this property as disclosed by the evidence.

DID THE RECEIVER BY REASON OF HIS REPURCHASE OF THIS PROPERTY FROM MR. SIMPSON, WHILE HE WAS YET RECEIVER, CHARGE IT WITH A TRUST FOR THE BENEFIT OF THE ESTATE?

Mr. Baker's receivership terminated in April, 1899. It is admitted that he repurchased tide land contract No. 728 covering block 430 in March pre-

ceding, so that possibly thirty days at most before his receivership closed he repurchased from Simpson a part of that which he had previously sold him. It was the contention of the appellee in the trial court that the receiver had no such right. It was the contention of the appellant Baker, in which we believe the law sustains him without doubt, that if the sale by Mr. Baker to Mr. Simpson was a *bona fide* one without any reservations whatsoever, Mr. Baker, having thus performed his full duty, would have a right to purchase this tide land contract at some future date. Mr. Baker testified that at the time the sale was made he had no reserve interest actually or in expectancy in these two tide land contracts and that he did not then have any expectation of ever acquiring any interest in these two contracts. (Tr. p. 262.) Unless Mr. Baker's testimony is absolutely disregarded there can be no question but what this was a fact. We do not think it is necessary upon the face of this record to argue this particular feature, but one side light is worth bringing to the attention of the Court at this juncture. Contracts No. 727 and No. 728, covering two blocks of tide land, were sold to Simpson in November, 1897. The appellee says that this was a fraudulent transaction; the appellants say it was not. The sale of

the two blocks was one and the same transaction; therefore if it was fraudulent as to one block, it was fraudulent as to the other. There must have been some subsequent arrangement even upon the appellee's theory of these facts, for his allegations of fraud comprehend both contracts, and he is seeking to recover only one. He, therefore, must admit that at some subsequent time there was some arrangement between Mr. Simpson and Mr. Baker different from that which was originally entered into. The appellant Baker says that the original arrangement was a *bona fide* one, by which Mr. Baker sold to Mr. Simpson both these contracts, and that about a year and a half after that sale he bought back one of them. The appellee says that the original sale was a fraudulent one, but he offers no testimony or explanation as to when, or how, or the reason why, one of the blocks is dropped out of his calculations, and he is seeking to recover only a portion of that which he says was originally fraudulently conveyed.

But we return to the question of Mr. Baker's repurchase of this property in March, 1899, preceding the close of his receivership in April. We again assert that the testimony is clear and convincing that the sale to Simpson a year and a half previous-

ly was *bona fide,* for a valuable consideration, indeed full value, and without any reservations whatsoever, or any expectancy on the part of the receiver of ever becoming interested in this property. Fortunately, we have a decision by the Supreme Court of the United States bearing directly upon this question. In the case of *Robertson vs. Chapman,* 152 U. S. 673; 38 L. Ed. 592, we find this state of facts. A firm of lawyers, Chapman & Polk, of Nebraska, acting on behalf of a client residing in Maryland—the client being the trustee of an estate—sold for their client certain lots of land to one O'Donohoe. Before the payments upon the sale were actually made the lawyers purchased the property from O'Donohoe. The question presented in this case was whether while acting as the agents of their client in Maryland they could become the purchasers of the property which they had sold. The court lays down the general principles which are now well established, that an agent cannot take advantage of his principal, and cannot directly or indirectly become the purchaser and maintain any title thus acquired as against his principal, for by so doing his duty and his interest would come in conflict. Mr. Justice Harlan, writing the opinion of the court, says, p. 596:

"If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, * * * While his agency continues he must act, *in the matter of such agency,* solely with reference to the interests of his principal.* * *"

It will be remembered that O'Donohoe had agreed to buy, but had not yet made the first payment, having executed the notes that were a part of the consideration of the purchase price, and while the deed was coming from Maryland the sale was made from O'Donohoe to Chapman and Polk, and they paid the money that was ultimately turned over to their client. The court further says, p. 596:

"The sale to O'Donohoe was so far consummated that neither party was at liberty to undo what had been done. O'Donohoe executed his notes for the deferred payments, and, his wife uniting with him, gave a mortgage to secure them. The notes and mortgage were delivered to and accepted by the plaintiff, who executed a deed to O'Donohoe, and placed it in the hands of Polk, to be delivered to O'Donohoe, whenever a decree for the sale of the property was obtained, and upon the payment of the $1,000 stipulated to be paid in cash. So that at the time Polk took the property from O'Donohoe, it was not in the power either of the plaintiff or of O'Donohoe to rescind the contract between themselves, and Polk's agency for the sale of the property had, in every material sense, terminated. *Nothing*

*then stood in the way either of O'Donohoe agreeing that Polk should take the property, or of Polk becoming a purchaser from him.* If the sale to O'Donohoe was an actual sale, in good faith, so far as Polk had any agency in effecting it—if the contract between the plaintiff and O'Donohoe had been so far executed at the time Polk took O'Donohoe's place in the purchase, that it could not be rescinded by either party to it—then Polk's agency in selling the property did not prevent him from purchasing from O'Donohoe. * * * A real *bona fide* sale of the property, through the agency of Polk, and upon the terms prescribed by the plaintiff, and which sale was substantially completed between vendor and vendee, intervened between Polk's acceptance of the position of agent and his purchase of the property from the plaintiff's vendee."

This is an exact parallel with the case now before this court. A *bona fide* sale took place by Mr. Baker to Mr. Simpson, and this intervened between his agency as receiver, by the authority of which he made the sale, thus closing his work "in the matter of such agency," and his subsequent purchase of the property. This case of *Robertson vs. Chapman* is not sustained by as strong facts as are presented in the case at bar.

We invite the court's attention to the case of *Board of Trustees of Oberlin College vs. Blair,* 32 S. E. 203 (W. Va.), which lays down the principle that when an agent has fully discharged his trust in good faith and had no interest in the sale at the time

it was made, he may afterwards acquire the title from the purchaser, his rights being the same at that time as those of any other person with respect to the property so sold.

See also upon this point:

*Keet & Rountree Co. vs. Gideon,* 80 Mo. App. 609.

*Miller vs. Lebanon Lodge,* 88 Ind. 286.

We have not been able to find a decision that runs contrary to the rule of law as laid down in the foregoing cases, which is reasonable and common sense,—that if an agent has fully discharged his duties as to the particular subject matter of that agency, thereafter he may repurchase the property.

It will be kept in mind that Mr. Baker's agency was limited to his selling this property, not to the buying of property, and when the property was sold he had fully discharged every requirement of his agency, and when he repurchased the property he was performing an act without the realm of his agency.

## THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION.

The broad proposition that this action is not

maintainable under the laws of the United States, and that therefore the complaint does not state a cause of action, is based upon the following considerations:

First. The Merchants National Bank and the Receiver in winding up its affairs never acquired any title, either legal or equitable, to the tideland block 430 which the complainant seeks to recover. The present Receiver should not be decreed a trustee on account of any alleged misconduct of the former Receiver, Baker, in transferring the title to himself through Simpson as an intermediary.

Second. The entire consideration paid to the State of Washington for the title to the property involved has been paid by Simpson and his assigns. No part of the consideration was ultimately paid out of the funds of the insolvent Bank. The title is therefore not impressed with a trust in the nature of a resulting trust.

Third. The Bank and its Receiver were at all times wholly without power to purchase this property, and any attempted purchase was contrary to law and *ultra vires*. The Receiver Baker therefore did not at any time take title to himself for his own use and benefit in violation of any duty to the Bank or the trust which he was administering. The

complaint does not allege any transaction by means of which Baker reaped a profit for himself which under the law he had a right or duty to engage in for the use and benefit of the Bank and the insolvent trust which he was administering. The property is therefore not subject to a constructive trust.

Fourth. A court of equity will not at any time give aid and assistance to effect a result which the party who seeks the aid of the court would not be permitted to effectuate by voluntary agreement between the interested parties.

The same general premises of law and fact applies to each of these legal propositions and will therefore be stated before we discuss separately the decisions applicable. Tideland Block 430 originally constituted a part of the first-class tidelands within the City of Seattle lying between high tide and the inner harbor line established by the State Harbor Line Commission. The harbor line lease referred to in the complaint is the area lying between the outer and inner harbor lines reserved by the State of Washington for the purpose of navigation and commerce but subject to lease for commercial purposes under the state statutes.

"The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide." (*Constitution,* Art. 17, Sec. 1.)

"The tidelands of the State of Washington belong to the state, which has full power to dispose of them, subject only to the restrictions imposed by the Constitutions of the State and of the United States, and no individual can claim any easement in or impose any servitude upon the tide waters of the state without the consent of the legislature." *Eisenbach vs. Hatfield,* 2 Wash. 236.

The legislature of 1890 provided for the survey, appraisement and sale of the tidelands. By the terms of the act the abutting upland owner was given the option for sixty days after the appraisement to buy at the appraised value, after which time if the upland owner did not avail himself of this privilege any person might require the tideland to be sold at public auction. (Laws of 1890, p. 435.)

This option gave to the upland owner no vested interest. The right to purchase at the appraisement was a mere privilege subject to withdrawal at any time by the State and subject to change of the State's policy in the disposition of its public lands. The privilege to purchase given by the State prior to its acceptance is not a property right and was subject to be withdrawn or impaired without compensation. (*Allen vs. Forrest,* 8 Wash. 700.)

In 1893 the Legislature authorized the Commissioner of Public Lands to make a contract for the improvement of the State's tidelands by dredging canals and waterways to facilitate commerce and for the disposition of the dredged material upon the adjacent tidelands, thereby reclaiming the submerged and partly submerged land for useful purposes with the material excavated from the highways for vessels. The act gave to the contractor performing this service a lien upon the reclaimed lands in the amount provided for in the contract. (Laws of 1893, p. 241.)

Under this act the lien took effect upon the date of the contract and became enforcible as soon as the work is completed upon that portion of the lands and when the amount of the filling was ascertained. A subsequent purchaser cannot question the validity of the lien as he is held to have purchased subject to its terms. (*Schlopp vs. Forrest,* 11 Wash. 640.)

On October 27, 1894, Eugene Semple entered into a contract with the State through its Land Commissioner for the filling in of certain tidelands, including the lands involved in this litigation. Subsequently, W. D. Hofius, one of the purchasers of adjacent tidelands referred to in the evidence in this

case, brought an action to contest the validity of the Semple contract and the lien provided for in the contract under the law hereinbefore referred to. The decision by the Supreme Court reaffirms the rule of property previously announced, that an abutting upland owner has no vested right or interest in the tidelands, and that the privilege given to him for a limited time to buy at the State's appraisement was a mere preference which he enjoyed over the public in general, but that preference before its acceptance did not impose in any way any encumbrance or other burden upon the land in his favor. The lien which attached to Block 430 upon the making of the Semple contract in 1894 has since its consummation been ascertained to amount to approximately eighty thousand dollars.

Early in the year 1895 the State Land Commissioner filed a plat of the Seattle tidelands, dividing the same into lots and blocks, with an appraisement in accordance with the existing law. Within sixty days after the filing of the plat and the appraisement, on April 5, 1895, A. Macintosh, as president of the Merchants National Bank of Seattle, filed with the State Land Commissioner the application of the Bank to purchase several blocks, including No. 430. In his application Macintosh stated that

the Bank was the owner of the abutting uplands. Afterwards, on June 19, 1895, the Bank having become insolvent, Baker was appointed receiver. On January 12, 1897, the State in the meantime having approved the application of Macintosh in behalf of the Bank, a contract was executed between the State and the Bank by Baker as receiver, wherein the State agreed to sell and Baker agreed to purchase Block 430. Similar contracts were made affecting other lands applied for by Macintosh. In that contract it is provided:

"And the party of the second part hereby covenants and agrees to purchase of the party of the first part the above described land and to pay therefor the sum of fourteen hundred eighty-eight dollars ($1,488.00)," etc. (Trans. p. 105.)

One-tenth was paid by Baker upon the execution of the contract, the balance to be paid in nine annually maturing installments.

This contract was made by Baker previous to any application by him for authority to the Comptroller of the Currency and without the approval of the Secretary of the Treasury.

On January 26, 1897, Receiver Baker wrote to the Comptroller a letter requesting a ratification of his action in making this contract, in which he stated:

"This right to purchase is a valuable asset of the trust and accordingly I respectfully ask you to ratify the following contracts between the State and myself as Receiver" (among others) "all of Block 430, appraised value $1,488.00." P. 98.)

To which letter the Comptroller, through his deputy, answered:

"* * * Inasmuch as the contracts are assignable they can no doubt be disposed of to advantage at any time should such course seem advisable." (P. 99.)

We have before us in these facts a case of land speculation, pure and simple. The conclusion from these facts appearing upon the face of the bill, in connection with the law of which the court will take judicial notice, that the transaction was a speculation is emphasized by the evidence given by the witnesses on the subject of the value of the property, all of whom say that there was no market and that its value was purely speculative.

This brings us to the authority of the Bank and the Receiver to engage in the transaction.

"Power To Hold Real Property. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others:

First. Such as shall be necessary for its im-

mediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years." *III U. S. Compiled St.,* Sec. 5137; 13 *Stat. at Large,* 107.

Receivers of national banks are purely statutory creatures with statutory powers and no other powers. The following sections of the U. S. statutes are applicable:

"That whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the

facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

"Sec. 2. That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States." *III U. S. Compiled Stat.,* pp. 3514-15, Secs. 1 and 2; 24 *Stat. at Large,* 8.

It will be noted that Block 430 was owned by the State of Washington and was not subject to "any bond, mortgage, assignment or other proper legal claim attaching thereto" and was not about or subject "to be sold under any execution, decree of foreclosure or proper order of any court of jurisdiction."

This law was enacted to protect junior liens held by a bank against being wiped out in proceedings against real estate for the satisfaction of underlying obligations and clearly have no other purpose.

Aside from the fact that no law existed enabling the Receiver to make the purchase, he did not comply with the statute requiring him to submit a request for the right and authority to use and employ the money of his trust to make the purchase.

The Congress was not satisfied to commit the diversion of trust funds of an insolvent bank to the discretion of the Comptroller upon the advice of the Receiver or otherwise, but provided the additional safeguard set forth in Section 2 that no such diversion should be made without the concurrence and approval of the Secretary of the Treasury, and required that such approval shall be endorsed in writing and filed with the Treasurer of the United States.

We will now take up the legal propositions in the order stated under this title of the brief.

*The contract made between the Bank through Baker as Receiver and the State for the purchase of Block 430 was absolutely void so far as it affects the Bank and the insolvent estate which Baker was administering.*

The Supreme Court of the United States, to which we must look for authority, has drawn a clear distinction, in the application of the doctrine of

*ultra vires,* between that class of cases which grow out of loans made incidentally upon mortgage securities and that class of cases which grow out of purchases of property not authorized by a law.

*National Bank vs. Matthews,* 98 U. S. 621, is the authority relating to mortgage loans and the right of the mortgagor to question that authority to which all the later cases on the subject refer. The syllabus accurately states the point involved:

"A executed a promissory note to B, and, to secure the payment thereof, a deed of trust of lands, which was in effect a mortgage with a power of sale thereto annexed. A national bank, on the security of the note and deed, loaned money to B, who thereupon assigned them to the bank. The note not having been paid at its maturity, the trustee was, pursuant to the power, proceeding to sell the lands, when A filed his bill to enjoin the sale, upon the ground that, by Sections 5136 and 5137 of the Revised Statutes, the deed did not inure as a security for a loan made by the bank at the time of the assignment of the note and deed. *Held,* that the bank is entitled to enforce the collection of the note by a sale of the lands."

The opinion of Mr. Justice Swayne considers the case in two aspects. First, the transaction was not within the law of the United States prohibiting real estate loans. If the court had been content to stop here, it would have saved itself from the ne-

cessity of afterwards straightening out the confusion which the latter part of the decision created, but the court went further and viewed the case from a second aspect as a loan upon real estate security and, so treating it, came to the conclusion that the statute did not declare such security void but was silent on the subject; that had Congress so intended, it would have been easy to say so and it can hardly be presumed that this would not have been done instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. After citing numerous cases where a disregard of statutory prohibitions has not been held to vitiate the contracts of parties but only to authorize actions by the government, the Court held that the prohibitory clause of the banking law did not vitiate real estate securities taken for loans, and that a disregard of them only left the association open to proceedings by the Government. Mr. Justice Miller in dissenting said:

"I am of the opinion that the Banking Act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands."

In the subsequent case of *National Bank vs. Whitney,* 103 U. S. 99, involving the right of a

national bank to take real estate security in payment of a debt not previously contracted, the court held that the prohibition of a statute against real estate loans is not available by the mortgagor as a defense. Mr. Justice Field in the course of the opinion emphasized the ground on which the opinion is based:

"The question presented is not an open one in this court. It was determined in the case of *National Bank vs. Matthews*, at the October term of 1878" (p. 101). * * *

The construction of the act of Congress thus given has been acted upon by national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow departure from it. Judicial decisions affecting the business interests of the country should not be disturbed except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends in a great degree upon the stability of the rules by which these transactions are governed" (p. 102).

The ground of prior adjudication, upon which

the majority of the court appear to have based their decision, did not satisfy Mr. Justice Miller and Mr. Justice Harlan.

In the case of *Fortier vs. New Orleans Bank,* 113 U. S. 439, it is held that a mortgage given to a bank upon real estate to secure a loan is not void is held to be a question foreclosed by the *Matthews* and *Whitney* cases.

It is significant that in the *Whitney* case the court, after pointing out its practical inability to change the principle insofar as it affects commercial paper, stated in the second aspect of the *Matthews* decision, suggests legislation which will affect only future transactions.

In frequent decisions since *National Bank vs. Whitney,* the *Matthews* and *Whitney* cases are cited and distinguished limiting the scope of the principle to mortgage security taken by a bank, generally on the ground that such security is merely incidental to the personal credit based on the note or bond. What Mr. Justice Field refers to as the "second aspect of the *Matthews* case" was squarely presented to the Supreme Court as applied to transactions other than mortgage security in

*McCormick vs. Market Bank,* 165 U. S. 538.

Here we find it squarely decided that the principle of law announced in the *Matthews* and *Whitney* cases does *not* apply to a lease of real estate made in violation of the statute.

Section 3136, R. S., provides that until the association has been authorized by the Comptroller to commence the business of banking the corporation is forbidden to transact any business except such as is incidental and necessary to its organization.

After the incorporators had made and filed the certificate of organization but before the Comptroller had issued his certificate of approval, the lease in question was made for a room in which to transact the business of banking for a term of years with the right to cancel on ninety days' notice on May 1st any year. Suit was brought by the lessor for unpaid rent under the terms of the lease from the time the corporation surrendered possession until the following May 1st. The bank set up the provision of the statute prohibiting it from doing business when the lease was made in support of its plea of *ultra vires*. The plea of *ultra vires* was sustained and judgment for the defendant in the state court was affirmed. In the opinion by Mr. Justice Gray it is said:

"It is settled by a long series of decisions of this court that a lease of a railroad by one railroad corporation to another which is beyond the corporate powers of *either,* is unlawful and void and can not be made good by ratification or estoppel, so as to sustain an action upon the lease; that this is so not only when the lease is *ultra vires* of the *lessor* corporation and therefore open to the objection of disabling it from performing those duties to the public, its performance of which was the consideration it received its charter from the State; but even if the lease is *ultra vires* of the *lessee* corporation only and therefore not open to that particular objection." (Numerous citations.) (P. 550.)

"The lease sued on having been executed by the defendant contrary to express prohibition of the statute which peremptorily forbade the corporation to transact any business, unless to perfect its organization, and thus denied it the capacity of entering into any contract whatever except in perfecting its organization, the lease is void and cannot be made good by estoppel and cannot support an action to recover anything beyond the *value* of what the defendant has received and enjoyed." (P. 553.)

This case applied to the case at bar is compelling authority in support of our proposition that the contract of purchase from the State was absolutely void because (a) the Bank was forbidden to purchase the land, (b) the Receiver by implication could not have power to do anything greater than the Bank; (c) the statute does not give the Receiver the power to buy land requiring the expenditure of trust funds except to protect junior liens about to be

lost through sale of the property under superior liens; (d) and in no case without the prior express written authorization by the Comptroller, approved by the Secretary of the Treasury.

The document purporting to be a contract of purchase made with the State was void both because its subject matter is not within the statute authorizing the receiver of a national bank to purchase land under special conditions but was void for want of authority to make any contract just as the Market Bank was without power to make any contract until the Comptroller had approved the certificate of organization. In the case at bar, the joint authority of the Comptroller and Secretary of the Treasury was required. The authority required by the statute was never given either in the Market Bank case or the case at bar.

*McCormick vs. Market Bank* was decided March 1st, 1897. It appears from the opinion that the *Matthews* case (and only the so-called "second aspect" was applicable) was relied on to meet the defense of *ultra vires* pleaded by the defendant bank.

Nine days later, on March 10th, the doctrine of the *Matthews* case was again relied upon in argu-

ment in support of the proposition that under the national banking act the plea of *ultra vires* would not avail to relieve either party to a transaction forbidden by law. Counsel apparently did not comprehend, even with Mr. Justice Gray's clear language before them, the anomoly that a *void paper,* void among other reasons because it is against public policy, can have some vital force between the parties and that the Government's only remedy to enforce its laws is to punish the offender, leaving him in full enjoyment of the fruits of his offense.

This doctrine, repeated by counsel on the argument and supported by the Supreme Court of California, apparently impressed the Supreme Court of the United States with the importance of settling in unmistakable language the effect upon a written agreement of a statute prohibiting the acts constituting its subject matter.

"*An act or transaction expressly prohibited by statute is void ab initio.*"

*California Bank vs. Kennedy,* 167 U. S. 362. (Argued March 10, 1897.)

The present Chief Justice, speaking for the court, lays down the following principles, fortified by the citation of abundant authority:

"It is settled that the United States statutes

relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established."

"So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

An *ultra vires* act cannot be given vitality. The nullity of an *ultra vires* act may always be asserted.

"A contract of a corporation which is *ultra vires,* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." (Quoted from *Central Transp. Co. vs. Pullman's Palace Car Co.,* 139 U. S. 24.)

"The doctrine of *ultra vires,* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often

recognized and affirmed, upon three distinct grounds: The obligation of anyone contracting with a corporation to take notice of the legal limits of its powers; the interests of stockholders not to be subject to risks which they have never undertaken; and, above all, the interest of the public that a corporation shall not transcend the powers conferred upon it by law.

"The doctrine thus enunciated is likewise that which obtains in England."

(Then follows the citation of numerous English cases.)

"The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred. A dealing in stock is consequently an *ultra vires* act. Being such, it is without efficacy."

"If it could have been shown that it was an act absolutely prohibited by their memorandum of articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification." (Quoted from Chief Justice Selwyn.)

"I quite agree that the Royal Bank of India had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires,* and all that has taken place would not have been enough to constitute the Royal Bank of India shareholders in this bank, or prevent them from repudiating these shares."

"No other person or body of persons could be *prejudiced* or *benefited* or *affected* by an instrument

to which they were absolute strangers, such instrument being void as between the parties to it."

"The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank was one entirely outside of the powers conferred upon the bank, and was in no wise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. (*National Bank vs. Whitney,* 103 U. S. 99; *National Bank vs. Matthews,* 98 U. S. 621.) The difference between those cases and one like this was referred to in *McCormick vs. Market National Bank of Chicago, supra,* and it is, therefore, unnecessary to particularly review them.

"It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified."

The purchase of real estate by a national bank is expressly prohibited subject to certain exceptions not applicable to the case. There can be no difference in the application of the legal principle applied to corporation stock.

The principle is approved and amplified in *Concord First National Bank vs. Hawkins,* 174 U. S. 364.

The court had occasion to apply the principle of the *Kennedy* case in *First National Bank vs.*

*Converse,* 200 U. S. 425, the facts of which are quite analogous to the case at bar. The plaintiff bank was one of the creditors of a manufacturing corporation in the State of Minnesota, which failed. The creditors, including the bank, organized a new company for the manufacture of the same articles, exchanging their claims against the failed company for stock in the new. Afterwards the new company failed, and, under a Minnesota statute imposing double liability upon stockholders, suit was brought against the bank to enforce the statutory liability. The bank defended upon the ground, among others, that the whole transaction so far as it affected the bank was *ultra vires.* To avoid the effect of prior decisions of the Supreme Court, it was urged against this defense that the bank in participating in the reorganization of the old company and exchanging its claims arising out of debts contracted by the old company for stock of the new company, was protecting property legally acquired in the first instance in the collection of a debt. Upon this point the court, speaking through the present Chief Justice, said:

"The power of a national bank to engage in the character of business which the articles of association of the thresher company manifested, as defined

by the Supreme Court of Minnesota, cannot be inferred to have been possessed by the bank as an incident of securing a present loan of money or as a means of protecting itself from loss upon a preexisting indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a preexisting debt, does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held cannot be done. (P. 439.)

"The speculative venture, therefore, which the bank undertook, as held by the Minnesota court, when it engaged in taking the stock in the thresher company being *ultra vires,* it follows, under the settled rules hitherto applied by this court, that the bank, despite the subscription, was entitled to plead its want of authority as a defense to the claim of the receiver. The doctrine on the subject was stated in *De la Vergne vs. German Savings Inst.,* 175 U. S. 40, where it was said:

"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they do not undertake; that if the contract be prohibited by statute everyone dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized." (P. 440.)

We will conclude this branch of the argument

by referring to *Merchants National Bank vs. Wehrman,* 202 U. S. 295.

A partnership was formed to purchase, improve and divide into lots and sell a leasehold. There were forty shares in the firm represented by transferable certificates. The bank took nine of these shares as security for a debt and afterwards became the owner in satisfaction of the debt. It was claimed that the partners must contribute to pay the debts of the firm, and some of them being insolvent, the bank was charged with the full share of a solvent partner. The Supreme Court of the State held that the bank could not be thus held but decided that the bank became a part owner of the property and afterwards joined in the management of the same, and was liable for nine-fortieths of the expenses which constituted the debts of the firm. A writ of error was prosecuted from the Supreme Court of the United States to reverse this judgment. The Court held that the taking over of a certificate of partnership in payment of a pre-existing debt was an *ultra vires* act, because if it were held good it would subject the bank to a liability and under the law a national bank cannot incur such liability. Mr. Justice Holmes concludes the opinion on this point by saying:

"It recently has been decided that a national bank cannot take stock in a new speculative corporation with the common double liability, in satisfaction of a debt." (*First National Bank vs. Converse,* 200 U. S. 425.) "*A fortori,* it cannot take shares in a partnership to the same end." (P. 301.)

A national bank is not authorized by law to purchase its own shares.

*Burrows vs. Niblack,* 84 Federal, 111.

This was an action in assumpsit, brought by the receiver of a national bank to recover the sum of Ten Thousand Dollars paid by the bank before insolvency to one of its stockholders as consideration for the purchase of its stock. The stock was delivered to the bank and held by the receiver among the effects when the suit was brought. The Circuit Court of Appeals affirmed the judgment in favor of the receiver on the ground that no title to the stock ever passed to the bank because the bank had no power to make the purchase. The whole transaction of sale and purchase was held absolutely void.

Under these authorities which express vital law applicable to the case at bar, the contract made between the insolvent Merchants National Bank, by Baker, its receiver, and the State of Washington, for the purchase of this Block 430, was so far as it affected in any way the bank, either as an asset or

liability, absolutely void. The fact that the State afterwards recognized this contract as a basis for making a deed to Norton, upon payment of the full consideration to the State, by Simpson and his assignee, has nothing to do with the case. The State could dispose of its tide lands to any person who saw fit to buy them. It was within the power of the State to sell this land without a contract, upon payment of the full amount of the appraisement. Having received the full consideration it made the deed to the parties and the assigns of the parties who paid the price. Baker had no more right, after this paper purporting to be a contract between the Bank and the state, had been signed, to perform any of its executory obligations than he had to enter into the contract in the first instance. If, therefore, it be true as alleged in the bill, that he individually paid to the State the subsequent accruing installments, either directly or through the instrumentality of Simpson, he cannot be held to have violated a duty which he owed to the trust which he was administering. The highest measure of his duty to the trust was to do for its benefit everything which the law permitted him to do. It was not any part of his duty to continue to violate the law by misappropriating the trust funds

in his hands and continuing to do that which the law and public policy forbids.

*The land is not impressed with a resulting trust.*

A resulting trust arises out of the ancient equitable principle that the beneficial estate follows the consideration and attaches to the party from whom the consideration comes. (*Pomeroy's Equity Jurisprudence,* 2 Sec. 1037.) This doctrine is carried to the extent of awarding allequot parts of real estate to the persons who contributed to the consideration in proportion to the amount severally contributed by each. (*Pomeroy's Equity Jurisprudence,* 2, Sec. 1038.)

While Baker as receiver paid two of the ten annual installments to the State, out of the funds of the trust, the fact that the money was misappropriated and he was liable on his bond to restore it, which he afterwards did, makes either Baker individually or Simpson the real contributor to the consideration. Equity looks through the form and goes to the substance. That the following eight payments were made by Baker and Simpson out of their own funds, without any confusion with the funds of the trust, appears from the allegations

of the bill. The first two of the ten payments made by Baker while he was receiver cannot impress the title with a resulting trust, even *pro tanto,* because the payment was made with misappropriated money, for which he as receiver was liable, and because he was positively prohibited by law from making the investment, and as we shall discuss hereafter, a court of equity will not abuse its processes to accomplish an illegal purpose.

*The property is not impressed with a constructive trust.*

Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner. (*Pomeroy's Equity,* Sec. 1044.)

The bill in this case apparently charges defendant Baker with an unlawful acquisition of trust property while acting in a fiduciary relation. A constructive trust of this character rests upon the broad doctrine that a fiduciary person must give to his principal the product of everything he accomplishes in the performance of what he does with relation to his principal's property. He is not permitted to appropriate to his own benefit anything to which the principal is entitled, either by

way of original property which comes into his hands, or profits which arise out of that property, or through his labor as trustee. A familiar statement of the rule is that the principal is entitled to all the profits and the trustee to none (aside, of course, from express agreement). We are willing to put this rule in the very strongest language expressive of the highest obligation possible to conceive.

But how does it apply in the case at bar? Here was a piece of property which neither the bank while a going concern, or the insolvent trust, had any right to acquire. Here was a piece of property which the supreme law of the land, in letters of light capable of being read by day and by night, said, "Thou shalt not touch." What duty did Receiver Baker owe to that property? He may have innocently supposed, and did undoubtedly suppose, that he owed the duty to his trust of making some money out of it, but in that conception of his duty he was mistaken and a right can never be founded upon a wrongful act performed through a misconception of duty. A title cannot be acquired through a violation of law which could not be acquired by obedience to law. To say that it was the duty of a

man in the performance of his public office to violate the law of the land appears to be an anomaly.

*Equity courts will not aid in the consummation of transactions prohibited by law.*

While authority might be multiplied in support of this proposition, we will not weary the court with profligacy of citations, but confine ourselves to a single case from the court of last resort upon questions of this character.

*Case vs. Kelly,* 133 U. S. 21.

Defendant Kelly and other trustees of the Green Bay Railroad Company solicited for that company donations of land ostensibly for the benefit of the road, but took the titles to themselves individually. They did this in a fraudulent manner by making the grantors in the conveyances believe that they, as officers of the company, could receive the conveyances for the benefit of the road. That the grantors did not really know to whom the paper conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. The defendants did not recognize this trust. The suit was brought to have a declaration of trust made by the court and a decree ordering conveyances by the defendants

of the land to the corporation. It was found that certain of the lands conveyed to the trustees in their individual names were intended for use by the corporation as operating property, such as depot grounds and rights of way, but that other lands were not useful for that purpose and were not lands which the corporation under the law had a right to acquire.

Defendants plead, among other things, the incapacity of the corporation to acquire by purchase or otherwise the lands not intended for use as operating property. In reply to this the receiver of the Railroad Company, who brought the suit, contended that the right and power of a corporation to receive land is one which concerns the State alone and the right of the corporation to the lands in question can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. On this point Mr. Justice Miller says:

"The case of *National Bank vs. Matthews,* 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action and is seeking to obtain the title to such lands. It has no

authority by the statute to receive such title and to own such lands, and the question here is, not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids."

The compelling authority running from *McCormick vs. Market Bank* and *California Bank vs. Kennedy* is followed and emphasized in every decision since and the application of the equity rule by the court, in *Case vs. Kelly,* which has not in any way been criticized since the date of its rendition, would, in our opinion, have justified resting this case wholly upon the allegations of the bill of complaint. The fact that we chose to place before this court independent grounds of defense is no suggestion of doubtful faith in the position that, granting the most extravagant allegations contained in the bill and applying them to the law of the case, complainant's suit is without merit.

HARBOR AREA LEASE NO. 181.

Assignment of errors, paragraph XI is as follows:

"Because the District Court erred in ordering the appellant Seattle Water Front Realty Company to hold said harbor area lease for the use and benefit of the appellee and to convey legal title to the appellee."

The Legislature in 1895, Session Laws of 1895, p. 563, provided for the leasing of the area between the outer and inner harbor line, and gave to the owner of abutting tide land the preference right for a limited period of time to make such lease for the uses of trade and commerce, and provided an annual rental to be paid to the State. The lease made by the State to Simpson required the continuing payment during the thirty-year period of the lease of an annual rental, and obligated the lessor to hold the property for the public uses. Neither the Bank or its Receiver could obligate the trust for the payment of this rental, and neither the Bank or its Receiver could engage in the business for which the lease was made. The lease by its terms clearly falls within the acts prohibited by the federal statute, and is void under the holding of the Supreme Court in *National Bank vs. Converse,* 200 U.

S. 425, and in *Merchants' National Bank vs. Wehrmann,* 202 U. S. 295, heretofore cited.

Aside from the legal inability of the Receiver to make this lease, there is no suggestion that the lease was entered into by Receiver Baker or by the Bank. It is admitted that the lease was made between Mr. Simpson and the State. The lease was purchased by Baker long after his connection with the receivership had ceased, and for a valuable consideration wholly independent of the amount that Mr. Simpson had paid the state. (Tr. pp. 163, 278.)

## SUMMARY OF THE FACTS.

The bill of complaint alleges no consideration from Simpson to Baker. The evidence, books of account and the reports to the Receiver prove the contrary, and that the Receiver received, passed into his books and into the treasury of the United States, through the Comptroller's office, the full amount of money which he presumed he had paid out and $50 additional upon each of these contracts.

The bill also alleges that Mr. Baker procured the issuance of harbor area lease No. 181 in the name of Mr. Simpson, and alleges that this was a part of the scheme to defraud. The exact contrary to this is proven. In 1904, five years after

Mr. Baker's purchase of block 430 from Simpson, he wrote to the Commissioner of Public Lands at Olympia to ascertain the status of the harbor area in front of block 430 (Tr. p. 278). Mr. Reed is unqualified in his testimony that the sale of the harbor area lease No. 181 was wholly disconnected with the purchase by Mr. Baker of block 430; that Mr. Simpson owned this harbor area lease, and that he required Mr. Baker to purchase it before he, Mr. Reed, would turn over to him the tide land contract on block 430 (Tr. p. 163). Here, again, the testimony flatly contradicts the allegations of the bill.

The bill further alleges that Mr. Baker from time to time advanced to and reimbursed Mr. Simpson for the sums that he was required to pay the State. The evidence is undisputed that this is not true. When Mr. Baker bought from Simpson in March, 1899, he paid Simpson the amount that he was then out, plus interest, which aggregated about $400. No other payment was ever made by Baker to Simpson until 1905, when the advances and the purchase price of the harbor area lease were paid to him. Here, again, the evidence is contrary to the allegations of the bill.

Again the bill alleges that the assignment was made by Baker to Simpson without actual consider-

ation, and without the knowledge or consent of the Comptroller of the Currency. The evidence, however, is clear and convincing that the sale was reported to the Comptroller of the Currency in the next quarterly report, and the name of the purchaser was given (Tr. p. 200). That the Comptroller subsequently sent Special Examiner Wing to Seattle in June, 1898, who investigated in person the particulars surrounding this sale and interviewed Mr. Simpson and Mr. Anderson, as well as business men and bankers of Seattle, after which he went with Mr. Hill, the receiver's bookkeeper, and viewed the property. In addition to all this we have the positive evidence of Mr. Baker that there never was any secret arrangement, but that the sale was a bona fide one, and was made only after six months of effort, in which he circularized the creditors, stockholders and real estate men of Seattle, and the best offer he could get was $1.00 for each of these contracts. It would seem also upon this point that the evidence was directly opposed to the allegations of the bill.

The bill further alleges that the facts "were wholly unknown to any of the creditors and stockholders of said Bank and to plaintiff and the Comptroller of the Currency until the year 1913."

There is not a scintilla of evidence to sustain any portion of this allegation. The appellee has wholly failed to prove any of the essential things that are necessary in order to avoid the doctrine of laches.

The bill further alleges that the facts as alleged therein were concealed until February, 1913, and that the Comptroller of the Currency first discovered them at that time. The appellee offered no testimony upon this point whatsoever. There is no showing that the Comptroller may not have known all these facts for all these years, or that the present receiver himself may not have known them for many years.

The appellee has failed to establish the material allegations of his complaint.

We believe that the testimony of the appellant Baker deserves the greatest consideration at the hands of this court. All the skill and energy which counsel for appellee were able to command they threw into their cross-examination of Mr. Baker, and he sat and unflinchingly and unswervingly told the facts, step by step as they occurred, and every incident, whether the complexion of that transaction was favorable or not, was related by him in a frank and straightforward manner. He admitted his intimate relationship with Mr. Simpson and

Mr. Anderson, and says it was because of this relationship and because of their being identified in the same electric power enterprise that Mr. Simpson was willing out of his generous disposition and large wealth to carry, after the sale by Simpson to him, this block until he could get his judgments paid up and reimburse Mr. Simpson the outlay. He related the condition of the real estate market, and that there was no sale for tide lands, and that all this property was of a speculative character. We do not hesitate to say that if Mr. Baker and Mr. Simpson had been guilty of the felonious conduct with which they are charged, counsel for appellee would have found on cross-examination some item of evidence to aid him in his theories, or he would have been able to have produced some witness who would have given some scrap of testimony that would have at least lent color to the theory of fraud which has been advanced so strenuously by the appellee. The record discloses the fact that the cross-examination of Mr. Baker was conducted practically without objection.

We respectfully submit that the appellee has

wholly failed in establishing his right to maintain this action, or the showing to the court of facts warranting the decree entered herein, and that the lower court should be reversed and this cause dismissed.

Respectfully submitted,

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